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NO. 81-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ARIZONA ELECTRIC POWER COOPERATIVE, INC.,
Petitioner,

v.

MID-LOUISIANA GAS COMPANY, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Arnold D. Berkeley
Richard I. Chaifetz
Suite 407
1925 K Street, N.W.
Washington, D.C. 20006
(202) 785-0611

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QUESTIONS PRESENTED

1. Whether the Court below erred in holding that intracorporate transfers of gas produced by federally or state regulated pipelines, gas distributors or end users, are "first sales" under the Natural Gas Policy Act of 1978, which must be priced at the maximum ceiling prices of that Act rather than at lower cost of service, area or national rates; a holding in direct conflict with the holding of the highest court of West Virginia on that issue.*

2. Whether the Court below erred in holding that the Natural Gas Policy Act of 1978 terminated, as to all "first sales," the pricing authority of the Federal Energy Regulatory Commission under the Natural Gas Act, so that vacation, rather than remand, was proper with respect to an agency rule setting forth its policies under the latter Act.

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* Now before this Court on a Petition for a Writ of Certiorari in Case No. 81-1672, *Pennzoil Company v. Public Service Commission of West Virginia.*

PARTIES BELOW

American Gas Association
Arizona Electric Power Cooperative, Inc.
Ciba-Geigy Corporation
Clarke-Mobile Counties Gas District
Colorado Interstate Gas Company
Columbia Gas Transmission Corp.
Conecuh-Monroe Gas District
Consolidated Gas Supply Corp.
Delvan Development Corp.
Ecee, Inc.
El Paso Natural Gas Company
The Federal Energy Regulatory Commission
Kansas-Nebraska Natural Gas Company
Kansas State Corporation Commission
Kentucky-West Virginia Natural Gas Company
Michigan-Wisconsin Pipe Line Company
Mid-Louisiana Gas Company
Mobile Gas Service Corp.
Natural Gas Pipeline Co. of America
Northern Natural Gas Company
Northwest Pipeline Corp.
The Public Service Commission of the State of New York
The Public Service Commission of Wisconsin
The State of Michigan and the Public Service Commission of Michigan
Scotch Plywood Co. of Alabama
Southern Natural Gas Company
United Gas Pipe Line Corp.
Wallace Energy Corp.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Arizona Electric Power Cooperative, Inc. ("AEPCO"), an intervenor supporting the respondent below, petitions for a writ of certiorari to review the December 23, 1981 decision of the United States Court of Appeals for the Fifth Circuit in *Mid-Louisiana Gas Company, et al.*, v. *Federal Energy Regulatory Commission*, Case No. 80-3804, and *Consolidated Gas Supply Corporation* v. *Federal Energy Regulatory Commission*, Case No. 80-4010.[1] Petitioner also seeks summary reversal of that

[1]The case below was heard and decided before the effective date of the Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. 96-452, 94 Stat. 1994 (October 14, 1980). Since the first of the several petitions for review of the FERC orders was filed by Mid-Louisiana Gas Company, which resides, is located and has its principal place of business in the present Fifth Circuit, it would appear that that Circuit would retain jurisdiction in the event of a remand by this Court. See NGPA Section 506, 15 U.S.C. §3416.

decision. The Court's decision vacated Order Nos. 58 and 98 issued by the Federal Energy Regulatory Commission ("FERC") on November 14, 1979, and August 4, 1980, respectively, on the basis of its interpretation of a statutory "first sale" under the Natural Gas Policy Act of 1978, ("NGPA") 15 U.S.C. §§3301, *et seq.*, and the relationship between the NGPA and the Natural Gas Act ("NGA") 15 U.S.C. §§717, et *seq.*, as to the pricing of pipeline produced gas.

OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 664 F.2d 530, and is reprinted in Appendix A.[2] The Commission's Order Nos. 58, 98 and its Order on Rehearing, No. 102, are not reported and are set out in Appendix B.[3]

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on December 23, 1981 (App. C-1). On January 11, 1982, the Court extended the time for petitions for rehearing until January 20, 1982 (App. C-2). Petitions for rehearing en banc filed by AEPCO and the State of Michigan and the Public Service Commission of Michigan, and for rehearing filed by the Public Service Commission of the State of New York, were denied on February 5, 1982 (App. C-3). This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

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[2]On April 12, 1982, the Public Service Commission of the State of New York filed a petition for a writ of certiorari and a separate appendix containing all pertinent decisions, orders and statutes. To avoid unnecessary duplication, AEPCO has agreed to pay a share of the costs of that Appendix and will rely on it herein. In addition, AEPCO includes at the end of this petition one further section labeled "Appendix E - Additional Statutes".

[3]References to the Appendix to this petition are hereafter given as "(App. ____)".

STATUTES INVOLVED

The Statute upon which the Court of Appeals decision is based is the Natural Gas Policy Act of 1978, 15 U.S.C. §§3301, *et seq.*, the relevant portions of which appear in Appendix D and Appendix E.

STATEMENT OF THE CASE

In 1938, Congress enacted the Natural Gas Act which gave the Federal Power Commission (FPC)[4] authority to regulate rates for natural gas sold by interstate pipelines. Such pipelines purchase or produce natural gas, transport it through interstate pipelines, and sell it at wholesale to resale gas distributors or at retail to direct industrial customers.

Historically, most natural gas transported by interstate pipelines was purchased from independent producers. The FPC permitted the pipelines to pass through to their customers the cost of purchased gas. However, many of the major interstate pipelines produced significant quantities of gas from properties which they owned or controlled. Most of this gas was used to serve the pipelines' own customers, although some was sold at the wellhead to other pipelines or end users which were not regular customers of the pipeline.

From the beginning of federal regulation under the NGA, rates of interstate pipelines were established on a "cost of service" basis. Under this method, pipelines recover all operating expenses, depreciation, taxes, and a fair return on investment from their customers. The pipeline's rates are determined by dividing total costs by the volume of gas produced. No unit rate, per Mcf or

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[4]The functions of the Federal Power Commission were transferred to the Federal Energy Regulatory Commission (FERC) in 1977 by the Department of Energy Act, Pub. L. 95-91, Aug. 4, 1977, 91 Stat. 565.

MBTU,[5], was ever set for gas produced by the pipeline for use by its own customers. *Canadian River Gas Co., et al.*, 3 FPC 32 (1942), *aff'd sub nom. Colorado Interstate Gas Co. v. FPC*, 324 U.S. 581 (1945). The costs associated with exploration, development and production are included with all other items in the cost of service and are an element in the final rate. Under the cost of service method, pipelines recovered these exploration and development costs irrespective of the ultimate cost of the natural gas or whether these efforts were even successful. Thus, the entire risk of a pipeline's exploration and development program was borne by its cstomers and they paid only the actual cost whether it was above or below the price charged by independent producers.

In *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954), this Court determined that under the NGA, the FPC also had jurisdiction over the prices charged to interstate pipelines by independent producers. Following *Phillips*, the Commission initiated several proceedings to determine the maximum prices which independent producers could charge. *Permian Basin Area Rate Proceeding*, 34 FPC 159 (1965), *aff'd, Permian Basin Area Rate Cases*, 390 U.S. 747 (1968); *National Rates for Jurisdictional Sales of Natural Gas*, 56 FPC 509 (1976), *aff'd sub nom. American Public Gas Association v. FPC*, 567 F.2d 1016 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 907 (1978). In fixing these prices, the Commission established cost related maximum *unit* rates, first on an area and then on a national basis. Such rates were geared to average producer costs. Under unit rates, the entire risk of unsuccessful production efforts was on the

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[5]An Mcf is a thousand cubic feet of natural gas. An MBTU is a thousand British thermal units. The heating value of one Mcf is approximately one MBTU.

producer. In addition, if the producer's costs exceeded the average, he would not earn a fair return on his investment and his stockholders would bear the loss. If he was more successful than the average, he realized greater profits.

In the *Pipeline Production Area Rate Proceeding* (Phase I), 42 FPC 738, (1969), *aff'd sub nom, City of Chicago* v. *FPC*, 458 F.2d 731 (D.C. Cir. 1971), *cert. den.*, 405 U.S. 1074 (1972), the FPC found that interstate pipeline production should enjoy parity of pricing with independent producers only with respect to leases acquired after October 8, 1969 — the date of its decision. Producing wells on leases acquired prior to that date would continue to be treated on a cost of service basis, *as would future wells on these leases.* Production from leases acquired after that date would receive the same treatment as production by independent producers, *i.e.*, the applicable area or national unit rate. Thus, on leases acquired after the Commission's decision, the pipelines would assume the risk of loss in the same manner as independent producers.

Because of the acute gas shortages and extensive curtailments on most pipeline systems in the mid-1970s, the FPC also gave the higher area or national rates to pipeline producers on old leases as an inducement to drill more wells on leases which would otherwise have received cost of service treatment. Thus, in *Just and Reasonable National Rates for Sale of Natural Gas*, 51 FPC 2212 (1974), *aff'd sub nom., Shell Oil Co.* v. *FPC*, 520 F.2d 1061 (5th Cir. 1976) *cert.den., sub nom, California Co.* v. *FPC*, 426 U.S. 941, (1976), the FPC determined that production from wells completed after January 1, 1973 on leases acquired prior to October 8, 1969, would also be eligible for area or national rates. *The FPC did this in a manner which insured that the pipelines would*

always be given the higher of cost of service rates or area or national rates. Thus, on a case-by-case basis, the FPC granted cost of service treatment for any production or portions thereof if the pipeline could "show in a rate proceeding that special circumstances exist which justify different treatment" (18 CFR 2.66(a)(4)). These special circumstances were that the applicable area or national rate was *less* than the cost of service rate. In addition, pipelines could obtain cost of service treatment for new properties through a settlement agreement with their customers. The Commission approved several such agreements.

In 1978, the NGPA was enacted as compromise legislation after extensive deliberation. That Act established a scheme of maximum price ceilings for different categories of natural gas. It provided that some categories were to remain permanently subject to regulation and others were to be deregulated on a fixed time schedule beginning on January 1, 1985.[6] Congress specified different prerequisites for eligibility for the ceiling price in each of the respective NGPA categories of natural gas. However, the existence of a statutory "first sale" is a common and indispensable prerequisite for eligibility for any NGPA price. Section 2(21)(A) specifies that a first sale means any volume of natural gas sold *to* an interstate pipeline or intrastate pipeline or local distribution company or a direct gas consumer. Section 2(21)(B) specifically excludes from the scope of a statutory "first sale" the sale of any volume of gas *by* an interstate pipeline, intrastate pipeline or local distribution company or affiliate thereof "unless such sale is attributable to volumes of natural gas produced"

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[6]Certain categories of "high cost" gas have already been deregulated.

by such a seller. The legislative history of Section 2(21) does not shed any light on its intended meaning, as noted by the Court below:

> Congress did not explain its definition of first sale either in the Committee reports that accompanied the various drafts of the NGPA or in the discussions that occurred in each House. [App. A-10].

In Order 58, acting pursuant to its NGPA authority under Section 501(a) to make substantive rules and its authority under Section 501(b) to define terms, FERC interpreted Section 2(21) as excluding from the definition of first sale, the intracorporate transfers of gas from a pipeline's production division to its transmission division. The agency relied on the "unless" clause of Section 2(21) and upon the literal language of that provision which required "that a sale be 'attributable' to the pipeline's own production" (App. B-3). Under this ruling, as FERC expressly noted, "if a pipeline were to sell its production at the wellhead, in an offsystem sale, such a sale would generally qualify under 18 C.F.R. 270.203(a) as a first sale." (App. B-2).

FERC held that NGPA maximum ceiling prices should be applied to actual sales rather than to *bookkeeping and accounting entries of a corporation.* It also noted that treating intracorporate transfers as sales would extend NGPA first sale jurisdiction to all end users which produced their own gas and found that such an extension of agency jurisdiction could discourage industrial self-help measures and contravene the policy expressed in Section 608 of the Public Utility Regulatory Policy Act, 15 U.S.C. §717f(c) and (d) (App. B-5 - B-6).

On rehearing, the five pipeline petitioners below[7] urged the Commission to impute a sale at the point at which the pipeline takes its production into its general system supply. FERC acknowledged that it had discretionary authority to do this under Section 501 of the NGPA and thereby accord first sale treatment to pipeline production (App. B-65). However, FERC stressed that its authority was *discretionary* rather than *mandatory* and that Congress had expressly delegated to it power to define the term first sale as it may apply to intracorporate transfers (App. B-65).

FERC noted that in its administration of the NGA, it had never treated such an intracorporate transfer as a sale. It relied on the facts that no contracts govern such transfers; no certificates under the NGA were issued or required for such transfers; and treating such transfers as sales could not be reconciled administratively with certain provisions of the NGPA. In addition, the agency found that the maximum lawful price under Section 104 of the NGPA assumed the existence of a just and reasonable rate applicable to the sale of natural gas before the enactment of the NGPA and since there was no sale, there was no just and reasonable unit rate applicable to the transfer. The Commission also noted that the provisions of Section 315 of the NGPA governing the duration of contracts, bona fide offers, and right of first refusal all depend upon the existence of a contract for their applicability and effect and no contracts are made for intracorporate transfers (App. B-66).

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[7]Mid-Louisiana Gas Co., Kansas-Nebraska Natural Gas Co., Michigan-Wisconsin Pipe Line Co., Consolidated Gas Supply Corp. and Kentucky-West Virginia Natural Gas Co.

In Order 98, the Commission determined that since pipeline production which was the subject of an intracorporate transfer was not a "first sale", it was called upon to exercise its discretionary powers under the NGA to determine whether pipeline production which had received area or national rates under the NGA should continue to receive such rates or should be made eligible for NGPA prices. The Commission thus extended its parity of rate treatment policy by granting NGPA prices to pipeline production which had been receiving area or national rates under the NGA. (App. B-25).

Order 98 also continued the Commission's policy respecting pipeline production by denying NGPA prices to all gas which had ever received cost of service rate treatment. FERC gave as the reason for this policy the fact that pipeline customers had paid for all exploration and development costs of such properties and equity required that the customers who had borne the risks receive the benefits of these production efforts (App. B-26).

Order 98 applied the same rationale to deny parity of pricing treatment to pipeline producers who had been permitted to depart from the area or nationwide rate and receive a higher cost of service rate under the "special circumstances provisions" of (18 CFR 2.66(a)(4) or a settlement agreement with its customers. It specifically noted that pipelines receiving such treatment had passed the risks of production ventures on to their customers in exchange for assuring those customers the opportunity to enjoy the benefits of successful ventures at a cost of service rate (App. B-26 B-27).

Order 102 denied rehearing of both Order 58 and Order 98. This order on rehearing gave *new and independent* reasons to support Order 58.

In *Mid-Louisiana*, the Fifth Circuit had before it petitions for review of Orders 58, 98 and 102. The Court held that on the basis of "...the language, purposes and history of the NGPA, we hold that Congress clearly intended for any production attributable to an 'interstate pipeline, intrastate pipeline or local distribution company, or any affilitate thereof' to be accorded first sale status under the NGPA and that Congress contemplated that the intracorporate transfer of pipeline production to the pipeline would be treated as the first sale." (App. A-15).

It therefore vacated Order No. 58. The Court went on to hold that since "...the Commission lacked authority to set prices for interstate pipeline production under the NGA," (App. A-15) it must vacate Order 98 without reaching the merits and that the effect of its holding " ... with respect to Order No. 58 is that the price for pipeline production will now be set under the NGPA." (App. A-15, ftn. 4). The Court did not vacate or reverse or mention Order 102 which is the final order of FERC in this rulemaking proceeding. *Ecee, Inc.* v. *FERC*, 611 F.2d 554 (5th Cir., 1980).

REASONS FOR GRANTING WRIT

Petitioner respectfully submits that the Court below should be summarily reversed because it has clearly erred in deciding an important federal question of first impression in a way that is in direct conflict with a state court of last resort, and has so far departed from the accepted and usual course of judicial proceedings as to call for *per curiam* reversal by this Court.

1. This a case which presents questions of first impression and national importance respecting the rate treatment of gas, produced in the United States by persons who are not independent producers, which is the subject of an intracorporate transfer. The decision below makes all transfers of gas produced by an interstate or intrastate pipeline or gas distributor a "first sale" under the NGPA, and vacated Order 58 on this ground. That decision also held that only the ceiling prices set in the NGPA could apply to such gas, and vacated Order 98 on that ground. NGPA prices are, with rare exceptions, substantially higher than the cost of service or area or national rates which would otherwise be used to price such intracorporate transfers so that *Mid-Louisiana* will compel huge rate increases at the Federal and State levels.[8] Thus, the decision below has a vital impact upon both FERC and State Commissions which must value self-produced gas for ratemaking purposes.

Under that decision, all gas produced during the lives of cost of service reserves owned or controlled by interstate or intrastate pipelines, or gas distributors will qualify for higher NGPA ceiling prices. In Order No. 98,

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[8]The impact of Mid-Louisiana on States is the subject of a pending petition for a writ of certiorari in *Pennzoil* v. *The Public Service Commission of West Virginia*, Case No. 81-1672, filed March 10, 1982.

FERC held that all gas produced from a cost of service *lease* was to be valued under the cost of service rate method forever. Order No. 98 applied to *all* cost of service *leases.*[9] This is true whether the lease was developed, i.e. had wells drilled thereon to prove the quantity of reserves, or was undeveloped (App. B-43). Thus, under Order 98, all new wells drilled on old cost of service leases would be priced at cost of service rates. If *Mid-Louisiana* is not reversed, however, *new wells* drilled on old cost of service leases will also be eligible for NGPA pricing.

Statistics are not available as to intrastate production, but are available to a meaningful extent for interstate pipelines. According to *"Statistics of Interstate Natural Gas Pipeline Companies-1979,"*[10] there are 26 large interstate pipelines which produce gas from reserves they own or control. These reserves comprised 8% of all reserves dedicated to interstate pipelines in 1979. The larger Class A and B pipelines owned or controlled 12,408 billion cubic feet of reserves in 1979. The dollar impact of the Court's action in vacating Order 98 depends on the difference between cost of service rates and the NGPA price consumers will pay for each

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[9]The importance of *Mid-Louisiana* is not reduced by the fact that relatively few pipelines entered into rate settlement contracts or were subject to specific Commission orders requiring the use of cost of service ratemaking on certain categories of production properties. *Mid-Louisiana* did not address these issues and did not purport to overrule *Pennzoil Company* v. *FERC*, 645 F.2d 360 (5th Cir. 1981), and *Columbia Gas Development Corp.*, v. *FERC*, 651 F.2d 1146 (5th Cir. 1981), which held that NGPA ceiling prices are not self implementing but are subject to price limitations in contracts and require filings under Sections 4 and 5 of the NGA.

[10]*Statistics of Interstate Natural Gas Pipeline Companies-1979*, U.S. Department of Energy, issued October, 1980.

thousand cubic feet of this gas over the productive life of these substantial reserves. Each $1 difference in this price equals $12.4 billion dollars over the life of these gas reserves. The range of NGPA prices now in effect is large. A recent rate filing by El Paso Natural Gas Company (El Paso), AEPCO's interstate supplier, shows that as of April 1, 1982, the lowest cost volumes under Section 104 were priced at 27.1¢ per MBTU, while Section 107(c)(5) gas was receiving $8.62 per MBTU for that same month.[11] This range could be even larger when certain NGPA categories are completely deregulated.

While it is not possible to estimate the entire impact of *Mid-Louisiana* on the rates of all pipeline producers, the present cost is known for El Paso. In its rate filing in FERC Docket TA82-2-33, El Paso claimed that implementation of that decision would increase its "purchased gas costs" by 39.15¢ per thousand cubic feet, or $259 million for the six month period ending September 30, 1982. In addition, El Paso claimed that retroactive implementation of *Mid-Louisiana* for the period December 1, 1978 through December 31, 1981 would increase its purchased gas costs by a net additional $109 million.[12] Thus, the excess of NGPA prices over cost of service rates for El Paso is at least $368 million for a 46 month period.

2. The decision below is in conflict with a decision of the highest court of a State. In *Pennzoil Company* v. *The Public Service Commission of West Virginia*, the Supreme Court of Appeals of West Virginia upheld an order of the West Virginia Public Service Commission in a rate proceeding involving a local distribution

[11]FERC Docket TA82-2-33, filed March 1, 1982.

[12]According to El Paso, the "net" effect is derived by eliminatial duplicate recovery of the same gas costs and eliminating certain special overriding royalties paid only by El Paso.

company which produced from reserves it owned or controlled a portion of the gas it sold at retail in that State. The State Commission held that under Section 2(21) of the NGPA natural gas produced by pipelines and local distribution companies is not subject to NGPA "first sale" maximum ceiling price regulation and that, therefore, such gas remained subject to cost of service ratemaking under West Virginia law. It specifically adopted the rationale followed by the FERC in Order Nos. 58 and 102 and rejected Pennzoil's arguments which were identical to those advanced before the FERC in opposition to Order Nos. 58 and 102. The State Commission after finding that Pennzoil was a "local distribution company," under NGPA Section 2(17), and that a portion of Pennzoil's sales is attributable to its production stated:

> Pennzoil would have the Commission apply first sale treatment to an intra-corporate transaction. Such a request was made of the FERC by several companies who petitioned the Commission (FERC) to reconsider § 270.203 of its final regulations promulgated in FERC Order No. 58. The FERC concluded that the regulation and enforcement of rates for sales of pipeline production should not be dependent on an event recorded solely on the books and records of the Company and that occurs without contract, bargaining, or certification. We find no reason for this Commission to follow a different conclusion.
>
> The Commission is of the opinion that *the hearing examiner's discussion of the "first sale" requirement of the NGPA is sufficient legal ground* upon which to find inappropriate Pennzoil Company's utilization of $3.31 as the lawful price for its produced gas. (At p. 15; emphasis added.)

Thus, the State Commission based its conclusion in *Pennzoil* solely on FERC's Order Nos. 58 and 102.[13]

In *Mid-Louisiana*, the Court below vacated Order No. 58 because it held that under Section 2(21) of the NGPA natural gas produced by pipelines is subject to "first sale" ceiling price regulation under the NGPA. The Court also held that under the NGPA, FERC is required to impute a sale at the wellhead for such intracorporate transfers and that it had frustrated the intent of Congress by failing to do so. This holding is in direct conflict with the decision of the West Virginia Supreme Court and Commission.

This conflict with respect to an important question regarding the interpretation and administration of the NGPA provides a sufficient basis under this Court's Rule 17.1(b) to support a grant of certiorari.

3. The Court's decision in *Mid-Louisiana* was based on its interpretation of the term "first sale" in the NGPA. The Court stated: ". . .NGPA contemplates that the pipeline is both a buyer and seller as to its own production." (App. A-8) This proposition rejects the conventional meaning of the term "sale" and conflicts with the text and the legislative history of the NGPA. The term "sale" as it is used in the definition of "first sale" is defined in Section 2(20) of the NGPA, 15 U.S.C. §3301(20). That section provides "...'sale' means any sale, exchange or other transfer for value." No consideration is paid when the production division of a pipeline transfers gas to another division of the same pipeline. While the term "transfer for value" is not defined

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[13]The hearing examiner in *Pennzoil* held that under Section 602 of the NGPA, which permits states to enforce lower charges for intrastate gas, Pennzoil could not charge NGPA prices for its production. However, the State Commission did not mention Section 602 in its decision.

anywhere in the NGPA, it is clear that it contemplates more than a mere bookkeeping entry in the accounts of one corporation. In fact, a transfer which does not encompass conveyance of title for valuable consideration is not a sale, exchange, or transfer for value. *Helvering* v. *Nebraska Bridge Supply & Lumber*, 115 F.2d 288, 290 (8th Cir., 1940). Here there is no buyer, no seller, no change of title, no consideration and no contract. Thus, under the plain language of the NGPA, there can be no statutory "sale" of gas transferred between divisions of a pipeline.

Furthermore, the entire structure of the NGPA demonstrates that it was patterned after FERC's regulation of independent producer sales under the NGA which set maximum lawful unit prices, first on an area basis and later on a nationwide basis. A true sale occurs when two unrelated parties negotiate a per Mcf or per MBTU unit price. Such parties enter into a contract and the sale is certificated. All of these elements are absent in the case of cost of service pipeline production, where there are no unit prices, no contracts, no just and reasonable rates and no fair market dealings between unrelated parties as FERC found in issuing its codified rule, 18 C.F.R. 270.203, defining a "first sale."

The Court's interpretation of "first sale" also ignores other sections of the NGPA which make it plain that such a sale relates to gas produced under contracts and sold under certificates. The NGPA reveals the Congressional purpose of perpetuating the FERC concept of prescribing only a ceiling price and preserving intact the contractual rights of the parties to negotiate a lower price. Thus, Section 101(b)(9) provides that the maximum lawful price established under the NGPA "shall not supersede or nullify the effectiveness of the price established under such contract."

Section 601(a)(1) continues FERC jurisdiction over gas which was committed or dedicated to interstate commerce on the day before enactment of the NGPA, but ends such jurisdiction when this test is not met. Section 315 of the NGPA covers the duration of contracts, bona fide offers and right of first refusal. It clearly assumes the existence of a contract. Pipelines do not make contracts with themselves to cover intracorporate transactions. The reach of this vitally important section is defined in terms of the existence of a *contract* or *certificate* in Section 2(18) which defines the term "committed or dedicated to interstate commerce." That section encompasses all natural gas in the Outer Continental Shelf and "natural gas which, if sold, would be required to be sold in interstate commerce (within the meaning of the Natural Gas Act) under the terms of any *contract*, any *certificate* under the Natural Gas Act, or any provision of such Act" (emphasis added).

Section 601(b)(1)(A) provided that the amount paid in any first sale of natural gas shall be deemed to be just and reasonable if it does not exceed the maximum lawful price established under Title I of the NGPA and paragraph (E) of that section requires that "in the case of any first sale between any interstate pipeline and any affiliate of such pipeline. . ." the amount paid also shall ". . .not exceed the amount paid in comparable first sales between persons not affiliated with such interstate pipeline." Surely, the absence of a similar safeguard in the case of pipeline produced gas which is the subject of an intracorporate transfer demonstrates that Congress did not intend to include such gas within the statutory concept of a "first sale." It is absurd that a pipeline which produces gas through a separately incorporated affiliate is subject to the limitation of 601(b)(1)(E) but that a pipeline which elects to conduct its business as a

single corporate entity may charge itself a higher price than it would pay to any non-affiliated producer.

4. The Court below held that since FERC lacked authority to set prices for interstate pipeline production under the NGA, that prices would have to be set under the NGPA (App. A-15). On this basis, the Court vacated Order No. 98 merely because Order No. 58 was void. This action raises an important question of first impression: Whether the NGPA terminated FERC jurisdiction under Section 1(b) of the NGA over all aspects of the pricing of natural gas.

Order 98 did not set any unit price for natural gas. Rather, it set forth FERC's policies concerning the question of whether pipelines which had received cost of service treatment would be permitted to file for higher NGPA rates. FERC assumed that intracorporate transfers of pipeline produced gas were subject only to the NGA because there were no first sales. Neither FERC nor the Court addressed the question of whether any agency jurisdiction under the NGA would have survived if intracorporate transfers of pipeline production were a statutory NGPA first sale (App. B-71). Had FERC known that a question of the relationship of its powers under the NGA and NGPA was present, it could have written this same Order in terms of its powers over *pipeline rate filings* under the NGA.

Section 601(a)(1)(B) provides that, for purposes of Section 1(b) of the NGA, the agency's jurisdiction continues to apply to "natural gas which is committed or dedicated to interstate commerce as of the day before the date of the enactment of this Act" and which is not new or high cost natural gas. Clearly, Congress intended to preserve some FERC jurisdiction over

pipeline production or this section would not have been enacted. While *Pennzoil Company* v. *FERC*, 645 F.2d 360, 380 (5th Cir. 1981), held that "[g]as committed or dedicated to interstate commerce on November 8, 1978, and not removed from NGA jurisdiction by Section 601(a)(1)(B) is priced under Section 104, 106(a), 108 or 109(a)(2)" it also held that NGA Section 4 remains in effect as to such gas. Therefore, the Court held that any seller of natural gas eligible for NGPA category prices must file under Section 4 of the NGA for a rate increase and must have the right to file under the terms of its contract. *Columbia Gas Development Corp.* v. *FERC*, 651 F.2d 1146, 1155-1159 (5th Cir. 1981) held that the NGPA did not expressly repeal the filing requirements of Section 4 of the NGA and that repeals by implication are not favored and rejected Columbia's claim that the ratemaking sections of the NGA (4 and 5) "deal with *pricing jurisdiction*, when they in fact deal with *pricing authority* for gas over which the Commission has jurisdiction under NGA § 1(b)" (Emphasis added; at p. 1158, Ftn. 14). Therefore, some NGA *pricing authority* survives and the question of whether it would suffice to support part, or all, of the substantive regulations promulgated by Order 98 is a matter exclusively within the jurisdiction of the FERC.

Since this is the case, enough NGA pricing power survives to make it necessary for FERC to determine whether it should recast Order 98 in order to meet its statutory duties. This determination must be made by the regulatory agency in the first instance. The Court below plainly committed an egregious error in vacating Order 98 rather than remanding it to the agency for further consideration. Such action by the Court clearly usurped an administrative function since the powers of

the Court end when it uncovers an error of law and it must remand to the agency. *FPC* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952).

Accordingly, AEPCO requests that if this Court denies certiorari and also denies summary reversal, it should issue a *per curiam* order directing the Court of Appeals to remand Order 98 for further consideration by FERC under the NGA and the NGPA since both of these statutes are committed to that Agency's charge.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted. If appropriate, the Court should summarily reverse the decision of the Court below insofar as it vacates Order Nos. 58 and 98.

If this Court denies both the foregoing requests, it should issue a *per curiam* Order reversing the vacation of Order 98 and remanding this case to the Court of Appeals with directions to remand that Order to FERC for further consideration.

Respectfully submitted,

ARIZONA ELECTRIC POWER COOPERATIVE, INC.

Arnold D. Berkeley
Richard I. Chaifetz
Suite 407
1925 K Street, N.W.
Washington, D.C. 20006
(202) 785-0611

April 22, 1982

ADDITIONAL STATUTES
NATURAL GAS ACT, 15 U.S.C. §§717, *et seq.*

15 U.S.C. § 717 c :

RATES AND CHARGES; SCHEDULES; SUSPENSION OF NEW RATES

Sec. 4(a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in

rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly thechange or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference

thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [52 Stat. 822 (1938); 76 Stat. 72 (1962); 15 U.S.C. § 717c]

15 U.S.C. 717 d:

FIXING RATE AND CHARGES; DETERMINATION OF COST OF PRODUCTION OR TRANSPORTATION

Sec. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas. [52 Stat. 823 (1938); 15 U.S.C. §717d]

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81-1958
NO. 81-

IN THE
Supreme Court of the United States
October Term, 1981

ARIZONA ELECTRIC POWER COOPERATIVE, INC.,
Petitioner,

v.

MID-LOUISIANA GAS COMPANY, *et al.*,
Respondents.

MOTION OF PETITIONER FOR CONTEMPORANEOUS CONSIDERATION AND DISPOSITION OF PETITIONS FOR CERTIORARI

Arnold D. Berkeley
Richard I. Chaifetz
Suite 407
1925 K Street, N.W.
Washington, D.C. 20006
(202) 785-0611

April 22, 1982

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NO. 81-

IN THE

Supreme Court of the United States

October Term, 1981

ARIZONA ELECTRIC POWER COOPERATIVE, INC.,

Petitioner,

v.

MID-LOUISIANA GAS COMPANY, *et al.*,

Respondents.

MOTION OF PETITIONER FOR CONTEMPORANEOUS CONSIDERATION AND DISPOSITION OF PETITIONS FOR CERTIORARI

Petitioner, Arizona Electric Power Cooperative, Inc. (AEPCO), hereby respectfully moves that the Court consider at the same Conference, for the purpose of determining whether a writ or writs of certiorari should be granted its simultaneously filed petition in the above entitled case ("Mid-Louisiana") and the petition seeking certiorari in *Pennzoil Company* v. *Public Service Commission of West Virginia*, (No. 81-1672, filed March 10, 1982 ("West Virginia")).

Petitioners are authorized to state that the Public Utilities Commissions of the State of California and the Commonwealth of Pennsylvania and the State of Michigan support this motion. They will shortly be filing

pleadings respectively supporting and seeking certiorari in *Mid-Louisiana*. A petition for certiorari has already been filed in this case by the Public Service Commission of the State of New York (No. 81-1889, filed April 12, 1982).

The *Mid-Louisiana* and *West Virginia* cases are related because they both involve the same question as to the interpretation of the definition of a "first sale"[1] in Section 2(21) of the Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. §§3301, *et seq.*, and because the State Court in West Virginia expressly adopted, as the basis for its decision, the very order of the Federal Energy Regulatory Commission (FERC) which was reversed and vacated by the Court of Appeals for the Fifth Circuit in *Mid-Louisiana*. That Order prescribed a rule applicable to all state and federal regulation of natural gas produced by an interstate or intrastate pipeline or by a state regulated gas distributor. Thus, there is a direct conflict between a Federal Court of Appeals and the highest court of a state on the same important, national question.

Petitioners in both cases rely on the importance of the issue, as well as upon conflict. The federal decision involves the broad impact of the conflicting interpretations of this statute on the administration of both the the Natural Gas Policy Act and the Natural Gas Act, 15 U.S.C. §717 *et seq.*, while the State decision involves such impact upon the administration of all state statutes regulating gas producing intrastate pipelines and distributors. Contemporaneous consideration will enable this Court to determine the true nationwide impact of these conflicting interpretations and whether

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[1]Only such sales make the gas involved eligible for the generally higher ceiling prices set by the NGPA, rather than lower prices set under the Natural Gas Act.

a grant of certiorari is appropriate, on an individual or consolidated basis.

Also, this Court can consider whether it is appropriate to summarily reverse *Mid-Louisiana* and summarily affirm *West Virginia* on the same grounds, as this petitioner maintains. This could well promote judicial economy.

All pleadings have been filed in *West Virginia* and it would normally be very soon placed on the Court's calendar for disposition. Therefore, Petitioners respectfully request that action on *West Virginia* be deferred until *Mid-Louisiana* is ready for simultaneous consideration and disposition. All petitions in the latter case are due to be filed on May 6, 1982. Thus, the delay we seek is slight and no party will be injured by the grant of this motion.

Respectfully submitted,

ARIZONA ELECTRIC POWER COOPERATIVE, INC.

Arnold D. Berkeley
Richard I. Chaifetz
Suite 407
1925 K Street, N.W.
Washington, D.C. 20006

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ARIZONA ELECTRIC POWER COOPERATIVE, INC.,
Petitioner,

v.

MID-LOUISIANA GAS COMPANY, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY OF ARIZONA ELECTRIC POWER COOPERATIVE, INC. TO OPPOSITIONS TO PETITION FOR CERTIORARI

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*Arnold D. Berkeley
Richard I. Chaifetz
Suite 407
1925 K Street, N.W.
Washington, D.C. 20006
(202) 785-0611

Attorney for the Petitioner
Arizona Electric Power
Cooperative, Inc.

*Counsel of Record

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No. 81-1958

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ARIZONA ELECTRIC POWER COOPERATIVE, INC.,
Petitioner,

v.

MID-LOUISIANA GAS COMPANY, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals For The Fifth Circuit

REPLY OF ARIZONA ELECTRIC POWER COOPERATIVE, INC. TO OPPOSITIONS TO PETITION FOR CERTIORARI

Our petition asserted that this case involves many billions of dollars to consumers and will affect prices for pipeline produced gas for many years. Respondents attempt to demonstrate that only a small amount of gas is involved, prices paid by consumers will not be greatly increased and the price impact will be only for a few years. This short reply will rebut these claims.

In our view, respondents' many arguments do not impair the validity of our reasons for the granting of certiorari. However, we have argued that this Court should reverse the decision below by issuing a *per curiam* opinion. Therefore, this reply will also rebut respondents' claim that this is not an appropriate case for summary reversal. Finally, we will show direct conflict between a federal and state court.

1. Respondents unite in the general argument[1] that our claims of a multi-billion dollar adverse impact on consumers are exaggerated. But, in the nine months since the decision of the Court below, 7 pipelines have filed for rate increases under *Mid-Louisiana*[2] totaling more than one-half of a billion dollars.[3] The Commission estimates that over the life of the pipeline owned reserves at issue, the decision below will cost consumers between $2 and $3 billion.[4] However, this estimate ignores certain relevant factors which will surely increase the cost of the *Mid-Louisiana* decision to consumers by many additional billions of dollars. Thus, that estimate reflects rate increase filings by only seven pipelines which together account for only 69.4% of all pipeline owned gas reserves. It excludes the 19 other pipelines which own the remaining 30.6% of such reserves.[5] When these other pipelines file for rate increases based on *Mid-Louisiana*, the annual impact is certain to increase. If this increase bears the same relationship to gas reserves as is reflected in the filings already made, the annual impact would increase from $181 to $261 million.[6]

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[1] e.g., Mid-Louisiana Br. in Opp. 26-28.

[2] *Mid-Louisiana Gas Co. v. FERC*, 664 F.2d 530 (5th Cir. 1981).

[3] Reply Memorandum of Federal Energy Regulatory Commission (Commission), Appendix A.

[4] Reply Memorandum, p. 1.

[5] *Statistics of Interstate Natural Gas Pipeline Companies--1980*. U.S. Department of Energy, issued October 1981. Appendix H (p. H-2) shows that pipeline owned reserves on producing gas lands totaled 11,501,215 MMcf. The pipelines listed in Appendix A to the Reply Memorandum held the following reserves according to that same table: Consolidated-394,483; Colorado-801,809; El Paso-5,826,889; Kentucky-W.Va.-184,003; Kansas-Nebraska-602,108; Mid-Louisiana-69,214; and Michigan-Wisconsin-107,439. This is a total of 7,985,945 MMcf--or 69.4% of total pipeline owned reserves.

[6] This figure is derived by dividing the $181,257,323 annual impact shown in Appendix A to the Reply Memorandum by the 69.4% of reserves owned by the pipelines who filed for those rate increases, multiplying by 100, and thus obtaining the total increase in rates.

The Commission's estimates also assume that the differential between NGPA and cost of service rates for pipeline production will remain constant. But, under the NGPA, wells are classified in different pricing categories. Wells can be, and are, reclassified from lower to higher priced categories. Such reclassification is significant with respect to pipeline production because so much of it is derived from "old wells" (drilled before January 1, 1973) on "old" leases (acquired before October 8, 1969). These older wells are usually classified in NGPA Section 104[7], but as they are depleted and production declines to below 60 Mcf per day, these wells are reclassified under Section 108 as "stripper wells." The dollar impact of such reclassification is substantial. For example, in the case of El Paso Natural Gas Company, revenues are 3.42 times greater for Section 108 gas than for Section 104 gas.[8]

Mid-Louisiana makes other cost of service gas wells eligible for initial classification in Section 104 and for later reclassification in other "high cost" gas sections of NGPA.[9] This "category creep" will continue over the productive lives of gas reserves owned by pipelines. Again, using El Paso as an example, that pipeline made two purchased gas adjustment

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[7] Section 104, titled "Ceiling Prices for Sales of Natural Gas Dedicated to Interstate Commerce," includes gas flowing before the enactment of the NGPA which was dedicated to interstate commerce.

[8] The latest purchased gas adjustment filing by El Paso in Docket TA83-1-33, dated September 1, 1982, shows an average "value" of Section 104 self-produced gas to $1.25, while the average price for Section 108 is shown as $4.30. Enclosure No. 4, Schedule A, Sheet 1.

[9] Section 102(b) establishes a maximum ceiling price for first sales of "new" natural gas. "New" natural gas is defined in §102(c)(1)(B)(ii) *inter alia* as gas from a depth of 1000 feet or more below an existing well. Thus, the mere redrilling of an old well to a depth of 1000 feet or more below the depth of the existing well will cause that well to become a new well eligible for deregulated prices on January 1, 1985. §121(a)(1) of the NGPA, 15 U.S.C. 3331(a)(1).

clause filings in 1982,[10] both of which included its own production priced at NGPA rates pursuant to the *Mid-Louisiana* decision.

These two filings were made only six months apart, yet the percentage of Section 104 gas to total produced gas declined from 51.8% in the first year to 44.3% in the second.[11] In addition, the price of Section 104 gas rose by only 1¢ per Mcf, while the average price of gas in all other categories of NGPA gas rose by 44¢ per Mcf.[12] Plainly, the Commission's figures do not reflect the full impact of gas well reclassification.

Respondent Mid-Louisiana finds the temerity to argue[13] that our estimates of the adverse dollar impact of NGPA pricing of pipeline produced gas "are grossly exaggerated." Yet, Mid-Louisiana's own rate filing shows that its revenues on its own production under NGPA rates are *16.25 times* its revenues under cost of service rates.[14]

Respondents' argument[15] that the Court should disregard

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[10] *El Paso Natural Gas Company*, Docket TA82-2-33, filed March 1, 1982, and Docket TA83-1-33, filed September 1, 1982.

[11] Docket TA82-2-33, Enclosure No. 6, Schedule B; Summary, and Docket TA83-1-33, Enclosure No. 4, Schedule A, Sheet 1. The former Docket shows that 9,571,809 Mcf out of 18,491,695 Mcf were classified in Section 104, or 51.8%. The latter Docket classified 33,501,329 Mcf out of 75,552,812 Mcf in Section 104, or 44.3%. (The difference in relative volumes in the two filings is due to a change from a one month estimated basis to a six month estimated basis.)

[12] *Id.* The "value" of Section 104 gas was $1.24 in the first Docket and $1.25 in the second. The unweighted average of all other categories was $4.33 in the first Docket and $4.77 in the second.

[13] Br. in Opp. 26-27; the same argument is made by El Paso Natural Gas Co., Br. in Opp. 20.

[14] *Mid-Louisiana Gas Company*, Docket TA82-2-15, Exhibit A, which shows a total cost under NGPA rates for 3,800,000 Mcf of that pipeline's production is $10,970,000 versus $675,000 for the same production under cost of service rates.

[15] Kansas-Nebraska Br. in Opp. 15-16.

this huge economic impact because it is only a small part of the total increased rates payable by consumers to *independent producers* is irrelevant. This increase is payable to *pipeline producers* and Congressional intent to afford an incentive to the former does not prove that it had a similar intent with respect to the latter. Even the Court below admitted that there was no clear evidence of Congressional intent to increase prices payable to pipeline producers.[16]

In our view, this multi-billion dollar impact shows that this case is of national importance even if respondents were correct in their further claim that *Mid-Louisiana* affects only gas produced from wells in a declining universe composed of "old" (pre-1973 wells) on "old" (pre-October 8, 1969) leases. But, respondents err in this claim too. The Commission's Order 98, which was vacated by *Mid-Louisiana*, provided that gas produced by *new wells* located on "cost of service leases" would not receive NGPA prices. Thus, Section 154.42(b)(2)(ii) excluded from NGPA rate treatment "natural gas produced from *leases* acquired before November 15, 1979, *which have ever been granted cost of service treatment* pursuant to §2.66(a)(4) of this chapter or pursuant to a settlement approved by the Commission in lieu of a finding of special circumstances under that section." (Emphasis added; Pet. App. B-48).

It is clear that Order 98 applied equally to the declining universe of old wells on old leases and the expanding universe of new wells on *any* leases which had ever been granted cost of service treatment.

2. We argued (Pet. 15-18) that an intracorporate transaction did not constitute a "sale" as defined by Section 2(20) of the NGPA and therefore the Court below erred in holding that there was a statutory "first sale." AEPCO was joined in this

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[16] 664 F.2d 530, 536 (5th Cir. 1981).

argument[17] by 3 petitioners[18] and 4 *amici*.[19] Only two respondents even discussed this claim which is the dispositive issue here. Of these, only one claims that an intracorporate transfer of pipeline produced gas can meet the literal language of the "sale" definition of NGPA.

Thus, El Paso argues (Br. in Opp. 13) that Congress defined the term "sale" in the disjunctive to include a sale, an exchange "or other transfer for value." The short answer to this claim is that the Conference Committee stated "[t]he definitions provided in the Act are generally self-explanatory, except as noted." S.Rep. 95-1126, 95th Cong., 2d Sess., p. 59.

Clearly, a definition is only self-explanatory if the ordinary meaning of the words used therein applies. Since there is no explanation of the definition of sale in the legislative history, it is clear that Congress intended the ordinary meaning of the words "sale," "exchange," and "transfer for value" to apply. El Paso focuses on only the term "transfer for value" and imputes to it an artificial meaning which is at war with its conventional meaning. A transfer is the passing of property from one person to another, *Black's Law Dictionary* (5th Ed., p. 1342).[20]

Since a single corporation is only one entity, the intracorporate transaction between its producing division and its transmission division clearly is not a transfer. Furthermore, the second element of a conventional "transfer for value" is also absent. The term "value" is

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[17] AEPCO alone made this argument in the Court below, but the Court there completely ignored it. Had that Court considered it, we are confident that a different result would have been reached.

[18] Commission Br., p. 16; New York Br., pp. 16-17; Michigan Br., pp. 10-15.

[19] Pennsylvania Public Utilities Commission Br., p. 3; Public Power Group Br., pp. 5-6; Associated Gas Distributors Br., pp. 5-6; California Public Utilities Commission Br., pp. 8-11.

[20] This conclusion is made applicable to pipeline production by §2(22) of the NGPA which defines the term "delivery" in the context of a first sale as meaning "...the physical delivery *from the seller* ..." (emphasis added). There is, of course, no seller in an intracorporate transaction.

synonymous with consideration."[21] *Black's Law Dictionary* (5th Ed., p. 1391).

We have shown that the specific legislative history of the definition section of the NGPA, Section 2, requires that the language of each of the definitions be construed by reference to its ordinary meaning. However, even if this compelling circumstance were absent, there is a general rule of statutory construction which requires that language in a federal statute be given its ordinary meaning and this principle has been specifically applied to a statute which defines the word "sale" and "exchange." Thus, El Paso's claim that the term "transfer for value" should not be given a meaning consistent with common law or state law principles is expressly rebutted by this Court's holding in *Commissioner of Internal Revenue* v. *Brown*, 380 U.S. 563, 571 (1965), where this Court applied the principle that:

> Generally speaking, the language in the Revenue Act, just as in any statute, is to be given its ordinary meaning, and the words "sale" and "exchange" are not to be read any differently. (Citation omitted).

In interpreting the terms sale and exchange as they are used in the Internal Revenue Code, the Court then defined those terms in the following fashion:

> 'A sale, in the ordinary sense of the word, is a transfer of property for a fixed price in money or its equivalent'...is a contract 'to pass rights for property or money, -- which the buyer pays or promises to pay to the seller...' compare the definition of 'sale' §1(2) of the Uniform Sales Act and in §2-106(1) of the Uniform Commercial Code. (Citations omitted).[22]

Mid-Louisiana argues[23] that every pipeline's delivery of its

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[21] For example, §1-201(44) of the Uniform Commercial Code provides in pertinent part:

> ...a person gives "value" for rights if he acquires them
>
> ***
>
> (d) Generally, in return for any consideration sufficient to support a simple contract.

[22] See also, *Tenneco Oil Co.* v. *FEA*, 613 F.2d 298, 302 (TECA. 1979).

[23] Br. in Opp. 18.

own produced gas to a downstream customer must satisfy the statutory definition of a "sale" and of a "first sale." This argument is totally irrelevant. The issue is not whether there is a sale at some point in the complete transaction beginning at the wellhead of pipeline produced gas and ending with its delivery to a separate business entity which purchases the gas for valuable consideration. The true issue is whether a sale at the wellhead may be imputed to an intracorporate transaction where there is neither a buyer nor a seller and no consideration. We have shown that it cannot.

3. We argued[24] that this Court should issue a *per curiam* order reversing the Court below for erroneously vacating Order 98 merely because Order 58 was voided. Only one respondent addressed this issue.[25] It argued that since the Commission had based Order 98 on the theory that it had full jurisdiction over pipeline production under the provisions of the Natural Gas Act, the reversal of its "first sale" holding necessarily required reversal of Order 98. We do not disagree with this statement, but it clearly begs the real issue. That issue is whether an agency should be given the opportunity to recast a substantive rule it has made on the basis of an erroneous theory, or whether that administrative determination can be unlawfully ursurped by a Court. This error is patent here since the Fifth Circuit has held in both *Pennzoil Co.* v. *FERC*, 645 F.2d 360, 380 (1981) and *Columbia Gas Development Corp.* v. *FERC*, 651 F.2d 1146, 1155-59 (1981) that the NGPA did not repeal or nullify the rate filing requirements of Section 4 of the Natural Gas Act as to independent producers. Thus, an independent producer cannot automatically collect NGPA prices, but must first satisfy the requirements of the Natural Gas Act. Surely, these restrictions on the right of independent producers to collect NGPA maximum ceiling prices must be equally applicable to pipeline producers. For, it is undisputed that sales of gas by independent producers are statutory "first sales." The mere fact that the Court below held pipeline producers to also be engaged in making such first sales, in the course of intracorporate transactions, certainly cannot afford the pipeline producer *greater* rights than are enjoyed by the

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[24] Pet. 18-20.

[25] Kansas-Nebraska Br. in Opp. 27.

independent producer who was the express beneficiary of the higher incentive prices granted by NGPA.

4. We argued[26] that the decision below conflicts with *Pennzoil Company* v. *The Public Service Commission of West Virginia.*[27] Respondents argue[28] that no conflict exists because that Court affirmed the decision below without stating any grounds. None of the respondents addressed our argument that the State Court could have affirmed only on the single ground given by the State Commission which adopted the rationale of the Federal Commission here. It is well established that a court can sustain agency orders only on the basis of the agency's reasons, *Camp* v. *Pitts*, 411 U.S. 138 (1973), and may not substitute its own rationale for that of the agency. *S.E.C.* v. *Chenery*, 322 U.S. 194 (1947). All of the alternative grounds for decision advanced by respondents are mere *post hoc* appellate rationalizations. *FPC* v. *Texaco, Inc.*, 417 U.S. 380, 397 (1974). Therefore, a direct conflict between these courts exists on an important federal issue and this Court should take jurisdiction to resolve this conflict.

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[26] AEPCO Pet. pp. 13-15.

[27] Supreme Court of Appeals of West Virginia, No. 80-175-G-42T (decided January 19, 1982). In this Court, that case bears Case No. 81-1672.

[28] e.g. El Paso Br. in Opp. 21-22.

CONCLUSION

For the foregoing reasons and those presented in our petition, it is respectfully submitted that AEPCO's petition for certiorari and motion for summary reversal should be granted. Alternatively, if both such requests are denied, we respectfully submit that this Court should summarily reverse the vacation of FERC's Order 98 by the Court of Appeals and direct that Court to remand Case No. 80-4010 below to the FERC for further proceedings.

Respectfully submitted,

*Arnold D. Berkeley
Richard I. Chaifetz
Suite 407
1925 K Street, N.W.
Washington, D.C. 20006

Attorneys for Arizona Electric
Power Cooperative, Inc.
*Counsel of Record

September 27, 1982

Certificate of Service

I hereby certify that on this 27th day of September, 1982, three copies of the foregoing Reply of Arizona Electric Power Cooperative, Inc., to Oppositions to Petition for Certiorari were mailed, postage prepaid, to all counsel of record.

Arnold D. Berkeley
Suite 407
1925 K Street, N.W.
Washington, D.C. 20006

Attorney for Arizona
Electric Power Cooperative, Inc.

Office - Supreme Court, U.S.
FILED
MAY 5 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1958

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

ARIZONA ELECTRIC POWER COOPERATIVE, INC.,

Petitioner,

v.

MID LOUISIANA GAS COMPANY, et al.,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONSE OF MID LOUISIANA GAS COMPANY TO MOTION OF ARIZONA ELECTRIC POWER COOPERATIVE, INC. FOR CONTEMPORANEOUS CONSIDERATION AND DISPOSITION OF PETITIONS FOR CERTIORARI

Alan C. Wolf
Vice President and
Corporate Counsel
Mid Louisiana Gas Company
Lykes Center, 21st Floor
300 Poydras Street
New Orleans, Louisiana 70130
(504) 581-5722

George W. McHenry, Jr.*
McHenry & Staffier, P.C.
1300 19th Street, N.W.
Suite 408
Washington, D.C. 20036
(202) 467-5880

Attorneys for
Mid Louisiana Gas Company

*Counsel of Record

May 5, 1982

No. 81-1958

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

ARIZONA ELECTRIC POWER COOPERATIVE, INC.,

Petitioner,

v.

MID LOUISIANA GAS COMPANY, et al.,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONSE OF MID LOUISIANA GAS COMPANY TO MOTION OF ARIZONA ELECTRIC POWER COOPERATIVE, INC. FOR CONTEMPORANEOUS CONSIDERATION AND DISPOSITION OF PETITIONS FOR CERTIORARI

Pursuant to Rule 42.4 of the Rules of the Supreme Court, Mid Louisiana Gas Company ("Mid Louisiana") hereby responds to the motion filed by Arizona Electric Power Cooperative, Inc. ("AEPCO") on April 22, 1982, requesting that the Court simultaneously consider at the same conference (1) the petition for certiorari filed in this case, seeking review of a decision of the United States Court of Appeals for the Fifth Circuit in Mid Louisiana Gas Company v. FERC, 664 F.2d 530 (5th Cir. 1981), and (2) the petition for certiorari filed in Pennzoil Company v. Public Service Commission of West Virginia, Docket No. 81-1672, seeking review of an unreported order issued by the Supreme Court of Appeals of the State of West Virginia on December 10, 1981, in Pennzoil Company v. The Public

Service Commission of West Virginia, Case No. 80-175-G-42T. 1/ In that motion, AEPCO alleges that the decision of the Fifth Circuit and the order of the Supreme Court of Appeals of West Virginia are in direct conflict on an important question, specifically, the meaning of "first sale" as used in Section 2(21) of the Natural Gas Policy Act of 1978 ("NGPA"), 15 U.S.C. 3301, et seq. AEPCO also suggests that it would be appropriate for the Court to summarily reverse the Fifth Circuit's decision in Mid Louisiana and summarily affirm the West Virginia Supreme Court of Appeals' order in Pennzoil.

In response to AEPCO's motion, Mid Louisiana submits the following:

1. Since Mid Louisiana is not a party to the Pennzoil proceeding, it takes no position on the appropriate timing for disposition of the petition for certiorari in that case. Mid Louisiana strongly disagrees, however, with AEPCO's assertion that there is a direct and irreconcilable conflict between the decision of the Fifth Circuit in Mid Louisiana and the order of the West Virginia Supreme Court of Appeals in Pennzoil. The one page order in the Pennzoil case is nothing more than a simple denial of a petition filed by Pennzoil Company seeking review of a decision of the Public Service Commission of West Virginia. 2/ Contrary to AEPCO's assertion (Motion at 2), the order does not expressly adopt, as a basis for the Court's decision, the orders of the Federal Energy Regulatory Commission ("FERC") which were vacated in the Mid Louisiana case. Indeed, the order makes no mention whatsoever of either the NGPA or the FERC's interpretation of the act. Nor does it set forth the reasons for denying Pennzoil's petition for review. Under these circumstances, it is

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1/ Mid Louisiana Gas Company is a wholly-owned subsidiary of Celeron Corporation (formerly Central Louisiana Energy Corporation). In addition, Mid Louisiana is an affiliate of South Louisiana Production Company, Inc., Louisiana Intrastate Gas Corporation, Trans Louisiana Gas Company, Inc., and LIG Chemical Company.

2/ See Appendix A to Pennzoil Company's petition for certiorari in Pennzoil Company v. Public Service Commission of West Virginia, No. 81-1672.

mere conjecture to conclude that the West Virginia Supreme Court of Appeals has interpreted "first sale", as used in the NGPA, in a manner which necessarily and irreconcilably conflicts with the decision of the Fifth Circuit. As the Public Service Commission of West Virginia has indicated in its brief in opposition in the Pennzoil case and its response to AEPCO's motion in this docket, the Court could have denied Pennzoil's petition for appeal on several grounds which are unrelated to the NGPA definition of "first sale". 3/ For example, the Court's disposition may have been based upon (1) a belief that states retain jurisdiction under Section 602 of the NGPA, 15 U.S.C. 3432, to establish maximum prices for in-state production which are less than the maximum NGPA ceiling prices; (2) a failure of Pennzoil to exhaust its administrative remedies; or (3) a failure by Pennzoil to show that the Public Service Commission's overall rate determination was improper under the Court's standards for review. 4/ It is thus clear that there is no direct and unavoidable conflict between the decision of the Fifth Circuit in the Mid Louisiana case and the order of the West Virginia Supreme Court of Appeals in the Pennzoil case.

2. In any event, as Mid Louisiana will demonstrate more fully in its brief in opposition to AEPCO's petition, there is no basis for the Court to grant a writ of certiorari and summarily reverse the Mid Louisiana decision. A brief review of that decision reflects that the Court of Appeals for the Fifth Circuit carefully analyzed the law and applied the correct principles of statutory construction in determining that the NGPA incentive ceiling prices are to be applied on a non-discriminatory basis to production of natural gas by interstate natural gas pipeline companies.

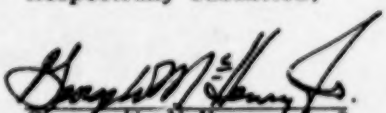
3/ See p. 2 of Response of Public Service Commission of West Virginia to the Motion of Arizona Electric Power Cooperation, Inc. For Contemporaneous Consideration and Disposition of Petitions For Certiorari, filed in this docket on April 29, 1982.

4/ See p. 8 of Brief of Public Service in this docket on Commission of West Virginia In Opposition to Petition, filed in Docket No. 81-1672 on April 9, 1982.

CONCLUSION

In view of the foregoing, Mid Louisiana submits that contemporaneous consideration and disposition of the petitions for certiorari in the Mid Louisiana and Pennzoil cases is not required. In any event, AEPCO's motion should be denied to the extent it requests summary reversal of the Fifth Cicuit's decision in Mid Louisiana.

Respectfully submitted,



George W. McHenry, Jr.*
McHenry & Staffier, P.C.
1300 19th Street, N.W.
Suite 408
Washington, D.C. 20036
(202) 467-5880

Alan C. Wolf
Vice President and
Corporate Counsel
Mid Louisiana Gas Company
Lykes Center, 21st Floor
New Orleans, Louisiana 70130
(504) 581-5722

Attorneys for
Mid Louisiana Gas Company

*Counsel of Record

May 5, 1982

CERTIFICATE OF SERVICE

I, George W. McHenry, Jr., a member of the Bar of this Court and a counsel for Mid Louisiana Gas Company, do hereby certify that, on behalf of Mid Louisiana Gas Company, I have this day served, in accordance with Rule 28 of the Rules of the Supreme Court of the United States, a copy of the foregoing response of Mid Louisiana Gas Company to Motion of Arizona Electric Power Cooperative, Inc. for Contemporaneous Consideration and Disposition of Petitions for Certiorari, by first class mail, postage prepaid, upon the following:

Jerome M. Feit, Solicitor
Federal Energy Regulatory
Commission
825 N. Capitol Street, N.E.
Washington, D.C. 20426

Rex E. Lee
Solicitor General
Department of Justice
Washington, D.C. 20530

John Holtzinger, Jr.
Karol Lyn Newman
Kevin J. Lipson
Morgan, Lewis & Bockius
1800 M Street, N.W.
Washington, D.C. 20036

Philip J. Mause
Norman A. Pedersen
Kadison, Pfaelzer, Woodard,
Quinn & Rossi
1229 19th Street, N.W.
Washington, D.C. 20036

Frank X. Kelly, Esq.
Gallagher, Boland, Meiburger
and Brosnan
821 15th Street, N.W.
Washington, D.C. 20005

Kim Martin Clark
Akin, Gump, Hauer & Feld
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036

Harry L. Albrecht
1120 Connecticut Ave., N.W.
Washington, D.C. 20036

James D. McKinney
William R. Mapes
Ross, Marsh & Foster
888 16th Street, N.W.
Washington, D.C. 20006

William W. Brackett, Esq.
Terry O. Vogel, Esq.
Brackett & Collins, P.C.
1899 L Street, N.W.
Washington, D.C. 20036

Philip C. Wrangle
Southern Natural Gas Co.
Exploration and Production
Division
P. O. Box 1513
Houston, Texas 77001

C. Frank Reifsynder
Hogan & Hartson
815 Connecticut Ave., N.W.
Washington, D.C. 20006

Daniel F. Collins
William W. Brackett
Brackett & Collins, P.C.
1899 L Street, N.W.
Washington, D.C. 20005

Kansas State Corporation Commission
William T. Miller, P.C.
Miller, Balis & O'Neil, P.C.
1030 15th Street, N.W.
Washington, D.C. 20005

Jeffrey D. Komarow
Cadwalader, Wickersham & Taft
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036

Raymond N. Shibley
Brian D. O'Neill
LeBouef, Lamb, Leiby &
MacRae
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036

William M. Lange
Michael Koenig
Colorado Interstate Gas Co.
P. O. Box 1087
Colorado Springs, CO 80944

Columbia Gas Transmission Corp.
John M. Hill
Giles D. H. Snyder
L. Micheal Bridges
P. O. Box 1273
Charleston, West Virginia 25325

United Gas Pipeline Corporation
John C. Nelson, Vice President
P. O. Box 1478
Houston, Texas 77001

Frederick Moring, Esquire
Jennifer N. Waters, Esquire
Crowell & Moring
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036

Neal Powers, Jr.
Butler, Binion, Rice,
Cook & Knapp
1100 Esperson Building
Houston, Texas 77002

Arnold D. Berkeley
Richard I. Chaifetz
Bruce J. Wendell
Suite 407
1925 K Street, N.W.
Washington, D.C. 20006

Richard A. Solomon
Wilner & Scheiner
1200 New Hampshire Avenue, N.W.
Suite 300
Washington, D.C. 20036

Robert R. Rodecker
General Counsel
Public Service Commission of
West Virginia
950 Kanawha Boulevard, East
Charleston, West Virginia 25301

Bruce F. Kiely
Kirk K. Van Tine
Baker & Botts
1701 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

John F. Povilaitis
Pennsylvania Public Utility
Commission
P.O. Box 3265
Harrisburg, PA 17120

Augustine A. Marci, Jr.
Kentucky West Virginia Gas Co.
420 Boulevard of the Allies
Pittsburg, PA 15219

F. M. Young
Young Radiator Company
2825 Four Mile Road
Racine, Wisconsin 53404

Michael A. Kelly
Chapman, Duff & Paul
1730 Pennsylvania Ave., N.W.
Washington, D.C. 20006

Walter G. Henderson, Sr.
El Paso Natural Gas Company
P.O. Box 1492
El Paso, Texas 79978

Robert N. Harbor
El Paso Natural Gas Company
1775 K Street, N.W.
Washington, D.C. 20006

Ronald L. Kuhn, Jr.
Southern Natural Gas Company
P.O. Box 2563
Birmingham, Alabama 35202

Ronald MacNicholas
Natural Gas Pipeline Company
of America
122 South Michigan Avenue
Chicago, Illinois 60603

Robert J. Haggerty
McGee & Ketcham
1019 19th Street, N.W.
Washington, D.C. 20036

Randolph Deutsch
California Public Utilities
Commission
350 McAllister Street
San Francisco, CA 94102

Alan J. Roth
Spiegel & McDiarmid
2600 Virginia Ave., N.W.
Washington, D.C. 20037

Phil Brown
1000 Long Boulevard
Suite 4
Lansing, Michigan 48910

L. Eugene Dickinson
Kentucky West Virginia
Gas Company
P.O. Box 1388
Ashland, Kentucky 41101

John F. Bates
Donald C. Shepler
Northwest Pipeline Corp.
P.O. Box 1526
Salt Lake City, Utah 84110

Donald J. Schellhardt
American Gas Association
1515 Wilson Boulevard
Arlington, Virginia 22209

J. Michel Marcoux
Buruder & Gentile
1201 Connecticut Ave., N.W.
Washington, D.C. 20036

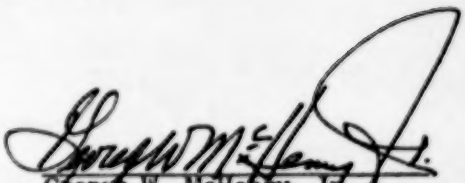
John B. Will
Northern Natural Gas Co.
2283 Dodge Street
Omaha, Nebraska 68102

Philip G. Wrengler
Exploration and Production
Division of So. Natural Gas Co.
P.O. Box 1413
Houston, Texas 77001

Donald J. MacIver, Jr.
P.O. Box 1492
El Paso, Texas 79978

C. E. Goodwin
Goodwin & Goodwin
500 Church
Repley, West Virginia 25271

Harvey Y. Morris
California State Building
Room 5066
San Francisco, CA 94102



George W. McHenry, Jr.
McHenry & Staffier, P.C.
1300 19th Street, N.W.
Washington, D.C. 20036
(202) 467-5880

Counsel of Record for
Mid Louisiana Gas Company

May 5, 1982

Office - Supreme Court, U.S.
FILED
MAY 6 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1958

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

Arizona Electric Power Cooperative, Inc.,

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v.

Mid Louisiana Gas Company, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE
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FOR THE FIFTH CIRCUIT

RESPONSE OF CONSOLIDATED GAS SUPPLY CORPORATION TO MOTION OF ARIZONA ELECTRIC POWER COOPERATIVE, INC. FOR CONTEMPORANEOUS CONSIDERATION AND DISPOSITION OF PETITIONS FOR CERTIORARI

John E. Holtzinger, Jr.
Karol Lyn Newman
Morgan, Lewis & Bockius
1800 M Street, N.W.
Washington, D.C. 20036
(202) 872-5000

May 6, 1982

No. 81-1958

IN THE
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October Term, 1981

Arizona Electric Power Cooperative, Inc.,

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ON WRIT OF CERTIORARI TO THE
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RESPONSE OF CONSOLIDATED GAS SUPPLY CORPORATION TO MOTION OF ARIZONA ELECTRIC POWER COOPERATIVE, INC. FOR CONTEMPORANEOUS CONSIDERATION AND DISPOSITION OF PETITIONS FOR CERTIORARI

Consolidated Gas Supply Corporation ("Consolidated"), 1/ one of the Respondents in No. 81-1958, hereby responds in opposition to the Motion of Arizona Electric Power Cooperative, Inc. ("AEPCO") For Contemporaneous Consideration And Disposition of Petitions For Certiorari, received by Consolidated on

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1/ Consolidated Gas Supply Corporation is a wholly-owned subsidiary of Consolidated Natural Gas Company. Other wholly-owned subsidiaries of Consolidated Natural Gas Company include: Consolidated Natural Gas Service Co., Inc.; The East Ohio Gas Co.; West Ohio Gas Co.; The Peoples Natural Gas Co.; The River Gas Co.; CNG Producing Co., Consolidated System LNG Co.; CNG Research Co.; CNG Coal Co.

April 26, 1982, to the extent that the motion suggests that this Court summarily reverse Mid Louisiana Gas Company, et al. v. FERC, 664 F.2d 530 (5th Cir. 1981), petitions for cert. filed, 50 U.S.L.W. 3840 (U.S. April 12, 1982) (No. 81-1889). 2/

In its motion AEPCO states:

> Also, this Court can consider whether it is appropriate to summarily reverse Mid Louisiana and summarily affirm West Virginia on the same grounds, as this petitioner maintains. This could well promote judicial economy. 3/

The West Virginia case referred to in AEPCO's motion is Pennzoil Company v. Public Service Commission of West Virginia, No. 81-1672 currently pending before the Court on a Petition for a Writ of Certiorari to the Supreme Court of Appeals for the State of West Virginia. Both petitions for certiorari raise the question of whether the Fifth Circuit erred in Mid Louisiana.

Although Consolidated firmly believes that the Fifth Circuit was correct in Mid Louisiana, for the following reason, Consolidated submits that it would be inappropriate for the

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2/ Petitions for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit have also been filed by Arizona Electric Power Cooperative, Inc., ___ U.S.L.W. ___ (U.S. April 23, 1982) (No. 81-1958) and the State of Michigan, ___ U.S.L.W. ___ (U.S. May 3, 1982) (No. 81-2042). As to the remaining issues raised by AEPCO's motion, Consolidated expresses no view and its failure to address those questions should not be viewed as acquiescence or agreement with AEPCO.

3/ Motion at 3. In its response to AEPCO's motion, the Public Service Commission of West Virginia states:

> Further, West Virginia supports AEPCO's request for summary reversal in Mid Louisiana.

Response at 3.

Court to consider summary disposition of Mid Louisiana at this time:

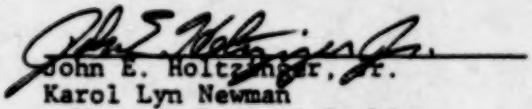
1. Three petitions for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit from Mid Louisiana Gas Company, et al. v. FERC, supra, and Consolidated Gas Supply Corporation, et al. v. FERC, 664 F.2d 530 (5th Cir. 1981) have been filed. The Solicitor General of the United States has been granted an extension of time to and including June 5, 1982, within which to file a petition for certiorari. At the very earliest, Respondents' oppositions to the petitions for certiorari already filed with the Court will be due on June 5, 1982. However, because of the extension of time granted to the Solicitor General, Respondents will be seeking an extention of time to and including 30 days from the date on which the Solicitor General's petition is filed or 10 days from June 5, 1982, if the Solicitor General elects not to seek certiorari.

2. In the Pennzoil case, which AEPCO suggests can be summarily decided in favor of West Virginia, Respondents have been advised by the office of the Clerk of the Supreme Court that the Court has invited the Solicitor General to file a brief expressing the views of the United States.

Consolidated does not believe that it would be appropriate for the Court to summarily decide the issues presented in Mid Louisiana before it has had an opportunity to hear from the United States in both Mid Louisiana and Pennzoil, and from the Respondents in Mid Louisiana. For this reason, Consolidated respectfully urges the Court to deny the suggestion of both AEPCO and The Public Service Commission of West Virginia to

summarily reverse the decision of the Fifth Circuit in Mid Louisiana.

Respectfully submitted,



John E. Holtzinger, Jr.
Karol Lyn Newman
Morgan, Lewis & Bockius
1800 M Street, N.W.
Washington, D.C. 20036
(202) 872-5000

May 6, 1982

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CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

ARIZONA ELECTRIC POWER COOPERATIVE, INC., Petitioner,	)	
v.	)	No. 81-1958
MID-LOUISIANA GAS COMPANY, et al. Respondents.	)	

RESPONSE OF EL PASO NATURAL GAS COMPANY IN OPPOSITION TO MOTION OF ARIZONA ELECTRIC POWER COOPERATIVE, INC. FOR CONTEMPORANEOUS CONSIDERATION AND DISPOSITION OF PETITIONS FOR CERTIORARI

C. Frank Reifsnyder
Hogan & Hartson
815 Connecticut Avenue
Washington, D. C. 20006

Donald J. MacIver, Jr.
General Counsel
Richard Owen Baish
Scott D. Fobes
El Paso Natural Gas Company
P. O. Box 1492
El Paso, Texas 79978

Of Counsel for

El Paso Natural Gas Company

May 6, 1982

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

ARIZONA ELECTRIC POWER COOPERATIVE, INC.,	)	
Petitioner,	)	
v.	)	No. 81-1958
MID-LOUISIANA GAS COMPANY, et al.	)	
Respondents.	)	

RESPONSE OF EL PASO NATURAL GAS COMPANY IN OPPOSITION TO MOTION OF ARIZONA ELECTRIC POWER COOPERATIVE, INC. FOR CONTEMPORANEOUS CONSIDERATION AND DISPOSITION OF PETITIONS FOR CERTIORARI

El Paso Natural Gas Company (hereinafter "El Paso"), */ pursuant to Rule 42.4 of the Rules of the Supreme Court of the United States, respectfully submits this response in opposition to the Motion of Petitioner for Contemporaneous Consideration and Disposition of Petitions for Certiorari. The motion of Arizona Electric Power Cooperative, Inc. ("AEPCO") is dated April 22, 1982, and was received by counsel for El Paso on April 26, 1982. El Paso was an intervenor in the proceedings before the United States Court of Appeals for the Fifth Circuit in this case.

AEPCO's motion should be denied in all respects.

1. AEPCO erroneously contends that the Fifth Circuit's decision in this case and the decision of the West Virginia Supreme Court of Appeals in Pennzoil Co. v. Public Service Commission of West Virginia, Case No. 80-175-G-42T, Dec. 10, 1981, petition for certiorari filed, No. 81-1672 (March 10, 1982) involve the same legal question. In the administrative orders at issue in Pennzoil, the Public Service Commission

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*/ El Paso is a substantially wholly owned subsidiary of The El Paso Company. El Paso's subsidiaries or affiliates (other than subsidiaries and affiliates that are wholly owned by El Paso or The El Paso Company) are:

Desert American Insurance Agency
El Paso Europe-Afrique, S.A.
Geonuclear Nobel Paso

of West Virginia held that the Natural Gas Policy Act of 1978, P.L. No. 85-621, 92 Stat. 3350 (1979) (codified at 15 U.S.C. Sections 3301, et seq.,) (hereinafter "NGPA") had not preempted the Commission's authority under state law to regulate Pennzoil's sale of its own natural gas production. Although the state commission affirmed the ruling of the Hearing Examiner that Pennzoil's sales of its production were not "first sales" within the meaning of Section 2(21) of the NGPA, the Commission also agreed with the Hearing Examiner's determination that NGPA Section 602(a) established an independent and self-sufficient basis for the Commission's rate order in that case. */ Since a determination of the "first sale" question would not be dispositive of the issues in Pennzoil, therefore, no basis has been shown for contemporaneous consideration of that case and the instant case.

Moreover, contrary to AEPCO's assertion (Motion at 2), the Supreme Court of Appeals of West Virginia did not adopt as a basis for its decision the Federal Energy Regulatory Commission's ("FERC's") orders that were reviewed by the Fifth Circuit in this case. Instead, that Court was completely silent with respect to the grounds for its decision. It is therefore apparent that AEPCO is seeking to create the impression of a conflict among the courts when, in fact, none exists.

---

*/ In its brief to the Supreme Court of Appeals of West Virginia, the West Virginia Commission stated:

> Thus, if for any reason the Court should reject the Commission's position that Company production does not qualify as a first sale under the NGPA, the Commission would submit that §602(a) of the Act recognizes the Commission's proper exercise of its ratemaking authority.

See Pennzoil's Petition for Certiorari in Case No. 81-1672 at 13.

2. Finally, AEPCO has not shown any basis for summary reversal of the Fifth Circuit's decision. That decision, rendered by a unanimous panel, reflects a thorough consideration of petitioner's arguments and those of the FERC concerning the statutory "first sale" definition. Moreover, its opinion rests not only on an analysis of the statutory language, but on a careful review of the statute's purpose and legislative history as well. In these circumstances, and in view of the present status of the record before this Court, summary reversal would be singularly inappropriate.

Respectfully submitted,

EL PASO NATURAL GAS COMPANY

By 
C. Frank Reifsnyder

Donald J. MacIver, Jr.
General Counsel
Richard Owen Baish
Scott D. Fobes
El Paso Natural Gas Company
P. O. Box 1492
El Paso, Texas 79978

C. Frank Reifsnyder
Richard C. Green
Hogan & Hartson
815 Connecticut Ave., N.W.
Washington, D. C. 20006

Of Counsel for

EL PASO NATURAL GAS COMPANY

Dated: May 6, 1982

Office - Supreme Court, U.S.
FILED
MAY 5 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1958

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

ARIZONA ELECTRIC POWER COOPERATIVE, INC.,
Petitioner,

v.

MID-LOUISIANA GAS COMPANY, et al.,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

RESPONSE OF KENTUCKY WEST VIRGINIA GAS COMPANY, KANSAS-NEBRASKA NATURAL GAS COMPANY, INC. AND MICHIGAN WISCONSIN PIPE LINE COMPANY TO MOTION OF ARIZONA ELECTRIC POWER COOPERATIVE, INC. FOR CONTEMPORANEOUS CONSIDERATION AND DISPOSITION OF PETITIONS FOR CERTIORARI

James D. McKinney, Jr. *
William R. Mapes, Jr.
Ross, Marsh & Foster
888 - 16th Street, N. W.
Washington, D. C. 20006

William W. Brackett*
Daniel F. Collins*
Terry O. Vogel
Brackett & Collins, P. C.
1899 L Street, N. W.
Washington, D. C. 20036

*Counsel of Record

STATEMENT UNDER RULE 28.1

Pursuant to Rule 28.1 of the Rules of the Supreme Court, Kentucky West Virginia Gas Company, Kansas-Nebraska Natural Gas Company, Inc. and Michigan Wisconsin Pipe Line Company submit the following listing of the parent companies and subsidiaries of the companies filing this response:

Kentucky West Virginia Gas Company

Berea Gathering Company
Equitable Gas Company
Kentucky Hydrocarbon Company
Kepco, Inc.

Kansas-Nebraska Natural Gas Company, Inc.

Cap-Con International, Inc.
Energy Transportation Systems, Inc.
Excelsior Oil Corporation
Kan-Col Company of Kansas
Midlands Gas Corporation
Midlands Transportation Co.
North Central Energy Company
Northern Gas Company
Northern Mountain Gas Co.
Northern Utilities, Inc.
Slurco, Inc.
Western Alfalfa Corporation
Western Alfalfa Transportation Systems, Inc.
Western Gas Corporation
Wyoming Fuel Company

Michigan Wisconsin Pipe Line Company

American Natural LNG Company
American Natural Offshore Company
American Natural Resources Company
ANR Elba LNG Terminal Company
ANR LaSalle LNG Terminal Company
ANR Production Company

No. 81-1958

IN THE
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OCTOBER TERM, 1981

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MID-LOUISIANA GAS COMPANY, et al.,
Respondents.

RESPONSE OF KENTUCKY WEST VIRGINIA GAS COMPANY, KANSAS-NEBRASKA NATURAL GAS COMPANY, INC. AND MICHIGAN WISCONSIN PIPE LINE COMPANY TO MOTION OF ARIZONA ELECTRIC POWER COOPERATIVE, INC. FOR CONTEMPORANEOUS CONSIDERATION AND DISPOSITION OF PETITIONS FOR CERTIORARI

Respondents, Kentucky West Virginia Gas Company, Kansas-Nebraska Natural Gas Company, Inc. and Michigan Wisconsin Pipe Line Company ("Pipelines") hereby respond to the motion filed in this proceeding by Arizona Electric Power Cooperative, Inc. ("AEPCO"), for contemporaneous consideration and disposition of the petitions for certiorari filed in Arizona Electric Power Cooperative, Inc. v. Mid-Louisiana Gas Co., et al., (No. 81-1958, filed April 23, 1982), and Pennzoil Co. v. Public Service Commission of West Virginia, (No. 81-1672, filed March 10, 1982). Pipelines submit that good cause has not been shown for contemporaneous consideration of these two cases and that AEPCO's motion should therefore be denied.

AEPCO first asserts that the Mid-Louisiana and Pennzoil cases are related and in conflict, alleging that both involve the same question as to the interpretation of the definition of a "first sale" in Section 2(21) of the Natural Gas Policy Act ("NGPA"), 15 U.S.C. §§3301, et seq., and that the West Virginia state court "expressly adopted, as the basis for its decision,"

the very order of the Federal Energy Regulatory Commission ("FERC") which was reversed and vacated by the U.S. Court of Appeals for the Fifth Circuit in Mid-Louisiana. It is not apparent, however, that the court in its one page order below in Pennzoil relied upon any definition of "first sale" in affirming the West Virginia regulatory Commission, since that Commission set forth several grounds for its decision and the West Virginia Supreme Court simply affirmed the Commission decision without specifying the grounds. In fact, the Public Service Commission of West Virginia has advised this Court that in its view the "West Virginia Supreme Court of Appeals did not adopt as the basis for its decision the order of the Federal Energy Regulatory Commission (FERC) which was reversed and vacated by the 5th Circuit in Mid-Louisiana." 1/ The West Virginia Public Service Commission determined that it could impose a rate on Pennzoil's sales of natural gas lower than the maximum lawful prices established in the NGPA on the alternative grounds of: (1) there was no "first sale" involved and (2) regardless of whether there was a "first sale" the West Virginia Commission had the power under Section 602 of the NGPA to prescribe lower maximum lawful prices for production within the state. 2/ Additionally, the West Virginia Commission also argued before the state court that aside from NGPA issues, the appeal by Pennzoil should be dismissed upon independent state grounds because Pennzoil failed to exhaust administrative remedies and failed to show that the

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1/ See "Response of the Public Service Commission of West Virginia to the Motion of Arizona Electric Power Cooperative, Inc., for Contemporaneous Consideration and Disposition of Petitions for Certiorari" filed herein on April 29, 1982, at 2. ("West Virginia Response").

2/ See Appendix B to Pennzoil Company's petition for certiorari in Pennzoil, supra, at 25b.

West Virginia Commission's overall rate determination was improper under the Court's standard of review. 3/

The state court below in Pennzoil simply did not reveal the basis for affirming the West Virginia Commission, nor any basis for presuming a conflict between the Pennzoil decision below and the Court of Appeals decision in the Mid-Louisiana case. 4/ Clearly, there is no reason for this Court to find a conflict when a conflict is not apparent and there are independent reasons which the West Virginia Court could have relied upon which would not result in a conflict with the Court of Appeals. In any event, if the decision below can be sustained on an independent or alternative ground, the fact that the decision conflicts with another appellate court does not constitute an adequate reason for the grant of certiorari. The Monrosa v. Carbon Black, Inc., 359 U.S. 180 (1959). In this regard, West Virginia has stated that it "views the Pennzoil case as involving separate legal grounds" from the Fifth Circuit's decision in Mid-Louisiana. 5/

Finally, Pipelines oppose AEPCO's inference in its motion that this Court should summarily reverse Mid-Louisiana. As will be more fully addressed in the Pipeline's briefs in opposition to AEPCO's petition for certiorari herein, this is clearly inappropriate where there was a unanimous holding in the Court below that the plain language, Congressional purpose and legislative history of the NGPA require that pricing of natural

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3/ See Brief of the Public Service Commission of West Virginia in Opposition to Petition for a Writ of Certiorari, filed on April 9, 1982, in Pennzoil, supra, at 8.

4/ The opinion of the West Virginia court is reproduced in Appendix A to Pennzoil Company's petition for certiorari filed in Pennzoil, supra, at 1a.

5/ West Virginia Response, at 2.

gas produced by an interstate natural gas pipeline is governed by the NGPA.

Respectfully submitted,

James D. McKinney, Jr.
William R. Mapes, Jr.
Ross, Marsh & Foster
888 - 16th Street, N. W.
Washington, D. C. 20006
Counsel for Kentucky West Virginia Gas Company

William W. Brackett
Daniel F. Collins
Terry O. Vogel
Brackett & Collins, P.C.
1899 L Street, N. W.
Washington, D. C. 20036
Counsel for Kansas-Nebraska Natural Gas Company, Inc. and Michigan Wisconsin Pipe Line Company

By _____
James D. McKinney, Jr.
888 - 16th Street, N. W.
Washington, D. C. 20006
202/822-8888

May 5, 1982

CERTIFICATE OF SERVICE

I, James D. McKinney, Jr., a member of the Bar of this Court and counsel for Kentucky West Virginia Gas Company, do hereby certify that, on behalf of Kentucky West Virginia Gas Company, Kansas-Nebraska Natural Gas Company, Inc. and Michigan Wisconsin Pipe Line Company, I have this day served, in accordance with Rule 28 of the Rules of the Supreme Court of the United States, a copy of the foregoing response of Kentucky West Virginia Gas Company, Kansas-Nebraska Natural Gas Company, Inc. and Michigan Wisconsin Pipe Line Company to Motion of Arizona Electric Power Cooperative, Inc. for Contemporaneous Consideration and Disposition of Petitions for Certiorari, by first class mail, postage prepaid, upon the following:

Jerome M. Feit, Solicitor
Federal Energy Regulatory Commission
825 North Capitol Street, N.E.
Washington, D. C. 20426

Rex E. Lee
Solicitor General
Department of Justice
Washington, D. C. 20530

John Holtzinger, Jr.
Karol Lyn Newman
Kevin J. Lipson
Morgan, Lewis & Bockius
1800 M Street, N.W.
Washington, D. C. 20036

Philip J. Mause
Norman A. Pedersen
Kadison, Pfaelzer, Woodard, Quinn & Rossi
1229 19th Street, N.W.
Washington, D. C. 20036

Frank X. Kelly, Esquire
Gallagher, Boland, Meiburger and Brosnan
821 - 15th Street, N.W.
Washington, D. C. 20005

Kim Martin Clark
Akin, Gump, Hauer & Feld
1333 New Hampshire Ave., N.W.
Washington, D. C. 20036

Harry L. Albrecht
1120 Connecticut Ave., N.W.
Washington, D. C. 20036

George W. McHenry, Jr.
McHenry & Staffier
Suite 403
1300 - 19th Street, N.W.
Washington, D. C. 20036

Alan C. Wolf
Mid-Louisiana Gas Company
Twenty-first Floor
Lykes Center
300 Poydras Street
New Orleans, Louisiana 70130

Philip C. Wrangle
Southern Natural Gas Co.
Exploration and Production Division
P. O. Box 1513
Houston, Texas 77001

C. Frank Reifsnyder
Hogan & Hartson
815 Connecticut Avenue, N.W.
Washington, D. C. 20006

Kansas State Corporation Commission
William T. Miller
Miller, Balis & O'Neil, P. C.
1030 - 15th Street, N.W.
Washington, D. C. 20005

Jeffrey D. Komarow
Cadwalader, Wickershaw & Taft
1333 New Hampshire Avenue, N.W.
Washington, D. C. 20036

Raymond N. Shibley
Brian D. O'Neill
LeBouef, Lamb, Leiby & MacRae
1333 New Hampshire Avenue, N.W.
Washington, D. C. 20036

William M. Lange
Michael Koenig
Colorado Interstate Gas Co.
P. O. Box 1087
Colorado Springs, Colorado 80944

Columbia Gas Transmission Corp.
John M. Hill
Giles D. H. Snyder
L. Michael Bridges
P. O. Box 1273
Charleston, West Virginia 25325

United Gas Pipeline Corporation
John C. Nelson, Vice President
P. O. Box 1478
Houston, Texas 77001

Frederick Moring, Esquire
Jennifer N. Waters, Esquire
Crowell & Moring
1100 Connecticut Avenue, N.W.
Washington, D. C. 20036

Neal Powers, Jr.
Butler, Binion, Rice,
Cook & Knapp
1100 Esperson Building
Houston, Texas 77002

Arnold D. Berkeley
Richard I. Chaifetz
Bruce J. Wendell
Suite 407
1925 K Street, N.W.
Washington, D. C. 20006

Richard A. Solomon
Wilner & Scheiner
Suite 300
1200 New Hampshire Avenue, N.W.
Washington, D. C. 20036

Public Service Commission
of the State of New York
Peter Schiff, General Counsel
Empire State Plaza
318 Floor
Albany, New York 12223

Robert R. Rodecker
General Counsel
Public Service Commission
of West Virginia
950 Kanawha Boulevard, East
Charleston, West Virginia 25301

Bruce F. Kiely
Kirk K. Van Tine
Baker & Botts
1701 Pennsylvania Avenue, N.W.
Washington, D. C. 20006

Donald I. MacIver, Jr., General Counsel
Arthur R. Formanek, Jr.
El Paso Natural Gas Co.
P. O. Box 1492
El Paso, Texas 79978

Robert T. Haggerty
Ted P. Gerarden
McGee & Ketcham
1019 - 19th Street, N.W.
Washington, D. C. 20036

American Gas Association
Donald J. Schellhardt
1515 Wilson Boulevard
Arlington, Virginia 22209

J. Michael Marcoux
1201 Connecticut Avenue, N.W.
Washington, D. C. 20036

Stanley W. Balis, Esquire
776 Executive Building
1030 - 15th Street, N.W.
Washington, D. C. 20036

Southern Natural Gas Co.
Ronald L. Kuhn, Jr.
Vice President
P. O. Box 2563
Birmingham, Alabama 35202

Natural Gas Pipeline Company
of America
Ronald MacNicholas, Vice President
122 South Michigan Avenue
Chicago, Illinois 60603

Miriam Vogel Gold
Legal Department
Ciba-Geigy Corporation
Ardsley, New York 10502

John B. Will
Deborah K. Vinson
Northern Natural Gas Company
2223 Dodge Street
Omaha, Nebraska 68102

James D. McKinney, Jr.
Ross, Marsh & Foster
888 - 16th Street, N.W.
Washington, D. C. 20006
202/822-8888

Counsel of Record for
Kentucky West Virginia
Gas Company

Office - Supreme Court, U.S.
FILED
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No. 81-1958

IN THE

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OCTOBER TERM, 1981

ARIZONA ELECTRIC POWER COOPERATIVE, INC.,
Petitioner,

v.

MID-LOUISIANA GAS COMPANY, *et al.*,
Respondents.

RESPONSE OF THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA TO THE MOTION OF ARIZONA ELECTRIC POWER COOPERATIVE, INC., FOR CONTEMPORANEOUS CONSIDERATION AND DISPOSITION OF PETITIONS FOR CERTIORARI

Robert R. Rodecker
General Counsel
Public Service Commission of
West Virginia
950 Kanawha Boulevard, East
Charleston, West Virginia 25301
(304) 348-2174

April 29, 1982

DI CESARE - Printing — 331-4101 — Washington, D.C. 20004

No. 81-1958

IN THE

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OCTOBER TERM, 1981

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Now comes the Public Service Commission of West Virginia (West Virginia) by counsel, and, pursuant to Rule 42.4 of the Rules of the Supreme Court of the United States, interposes its response to the Motion of Arizona Electric Power Cooperative, Inc. (AEPCO), for Contemporaneous Consideration and Disposition of Petitions for Certiorari. AEPCO's Motion was filed with the Court on April 22, 1982 and received by counsel for West Virginia on April 26, 1982. West Virginia is not a party in this proceeding and was not a party to the proceeding in the United States Court of Appeals for the 5th Circuit, in which AEPCO seeks this Court's review. West Virginia is, however, the respondent in the case of *Pennzoil Company* v. *Public Service Commission of West Virginia*, (No. 81-1672, filed March

10, 1982). It is this case which AEPCO seeks to have considered contemporaneously with its petition in No. 81-1958.

In response to AEPCO's Motion, West Virginia would like the Court to consider the following factors in its deliberations on the motion:

1. Contrary to the representations of AEPCO, the West Virginia Supreme Court of Appeals did not adopt as the basis for its decision the order of the Federal Energy Regulatory Commission (FERC) which was reversed and vacated by the 5th Circuit in *Mid-Louisiana*. *A review of the one page order of the West Virginia Supreme Court of Appeals*[1] reveals that the Court was silent on the bases for denial of Pennzoil's appeal. As West Virginia has argued in its Brief in Opposition to Pennzoil's Petition for a Writ of Certiorari, there were a number of other bases upon which Court could have relied.

2. As West Virginia has indicated in its Brief in Opposition in the *Pennzoil* case,[2] it intends to file an *amicus curiae* Brief in the *Mid-Louisiana* case in support of the petitions for writ of certiorari. However, the reason for supporting review of the *Mid-Louisiana* case is not based upon the identity of issue in the *Pennzoil* and *Mid-Louisiana* cases, but rather upon the substantial impact the *Mid-Louisiana* decision will have upon West Virginia utilities and their customers as a result of purchases of gas from interstate pipeline companies which have their own production. West Virginia views the *Pennzoil* case as involving separate legal grounds which require an affirmance, and support denial of certiorari regardless of the outcome of the petitions to review the Fifth Circuit's *Mid-Louisiana* opinion. Specifically, a determination that an intracorporate transfer of gas constituted a "first sale" of

[1]See Pet. App. A in case No. 81-1672.

[2]See n. 5 on page 10 of West Virginia's Brief in Opposition in Case No. 81-1672.

natural gas within the meaning of Section 2(21) of the Natural Gas Policy Act, 15 U.S.C. §§3301 *et seq.*, as held in *Mid-Louisiana*, would not be determinative of the additional issues with respect to the West Virginia Commission's regulation of the rates charged by intrastate utilities to retail consumers in the state which were before the Supreme Court of Appeals of the State of West Virginia and, as set forth in our Brief in Opposition to Certiorari in No. 81-1672, present no questions warranting review by this Court.

Finally, West Virginia wishes to make it clear to the Court that it has no objection to the Court's consideration of the *Pennzoil* petition at any time, including at the same time as the Court considers the petitions in *Mid-Louisiana*. Further, West Virginia supports AEPCO's request for summary reversal in *Mid-Louisiana*. However, there are sufficient independent state grounds and other bases under the NGPA to support the West Virginia Supreme Court of Appeal's decision in *Pennzoil* which justify separate consideration of the two cases, and denial of the petition for certiorari in *Pennzoil* regardless of the court's action on the petitions from the *Mid-Louisiana* opinion.

Respectfully submitted,

PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA

Robert R. Rodecker
General Counsel
950 Kanawha Boulevard, East
Charleston, West Virginia 25301

April 29, 1982

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

No. 81-1958

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Arnold D. Berkeley
Richard I. Chaifetz
Suite 407
1925 K Street, N.W.
Washington, D.C. 20006

May 7, 1982

No. 81-1958

IN THE
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OCTOBER TERM, 1981

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Petitioners,

v.

MID-LOUISIANA GAS COMPANY, et al.,
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REPLY OF ARIZONA ELECTRIC POWER COOPERATIVE, INC.
TO THE RESPONSES OF THE WEST VIRGINIA PUBLIC SERVICE COMMISSION,
KENTUCKY WEST VIRGINIA GAS COMPANY,
KANSAS-NEBRASKA NATURAL GAS COMPANY, INC. AND
MICHIGAN WISCONSIN PIPE LINE COMPANY
TO ITS MOTION FOR CONTEMPORANEOUS CONSIDERATION AND
DISPOSITION OF PETITIONS FOR CERTIORARI

Arizona Electric Power Cooperative, Inc. (AEPCO) hereby replies to the above-identified responses to its Motion for Contemporaneous Consideration and Disposition of Petitions for Certiorari. The State Commission filed a response in opposition and the three pipelines filed a joint response in opposition. AEPCO's Motion asked the Court to consider its petition simultaneously with the petition in Pennzoil Company v. Public Service Commission of West Virginia, No. 81-1672, because of direct conflict between the decision of the highest court of a state there and a Federal Court of Appeals decision here.

The State Commission argues that the decision of the West Virginia Supreme Court of Appeals was silent on the basis for its decision affirming the agency. The Commission states that several other possible grounds were presented to the Court on which it could have relied.[1/] But, the State Commission opinion relied exclusively on the federal regulations reversed in Mid-Louisiana as support for its decision. The State Commission argument that the State

1/ The West Virginia Commission in its opposition to the petition for certiorari in Case No. 81-1672 (pp. 9-16) listed a variety of grounds which the West Virginia Court could have relied on.

Supreme Court would affirm an administrative agency decision on different grounds from those asserted by the agency, without any indication of such a departure from the usual course of judicial practice, is without merit. This Court in S.E.C. v. Chenery Corp., 318 U.S. 80, 94-95 (1943), held that a reviewing court may affirm an administrative order only on the grounds enunciated by the agency. We have not found any West Virginia cases departing from this general judicial practice, which is rooted in the need to avoid judicial usurpation of administrative functions. The pipelines rely primarily (p. 2) on the State Commission's erroneous view concerning the basis for the decision by the West Virginia Supreme Court.

The pipelines also argue (p. 2) that the State Commission relied on Section 602 of the NGPA, 15 U.S.C. § 3432 to impose a rate lower than the NGPA prices on the alternative ground that "...the West Virginia Commission had the power under Section 602 of the NGPA to prescribe lower maximum lawful prices for production within the state,"citing page 25b of the Appendix. This page contains the Commission's findings of fact and conclusions of law. It does not refer to Section 602 of the NGPA and thus does not support the argument made by the pipelines.

None of the oppositions deny that there is a conflict between the express holdings of the two courts below on the first sale issue. Instead, they argue that the State Court could have decided on other grounds and that under such circumstances, conflict on one issue does not warrant the granting of certiorari. But, ever if Section 602 of the NGPA presents an independent ground, the law with respect to how a state implements its powers under that section to escape the application of the NGPA price ceilings for "first sales" presents an issue of first impression which has not yet been resolved by any court. Thus, the alleged independent ground here is vague and uncertain. This distinguishes Monrosa v. Carbon Black Inc., 359 U.S. 180 (1959) relied on by the pipelines (p. 3) because there the sufficiency of the alternate gound was undisputed.

The pipelines' opposition to AEPCO's Motion for summary reversal of Mid-Louisiana and summary affirmance of Pennzoil rests on the false premise that unanimity of a single panel precludes egregious error. There is no such limit on the discretion of this Court to render per curiam opinions on the basis of Petitions for Certiorari and briefs in opposition thereto.

Therefore, the arguments of the State Commission and the pipelines are lacking in merit and AEPCO's Motion should be granted.

Respectfully submitted,

Arnold D. Berkeley

Arnold D. Berkeley
Richard I. Chaifetz
Suite 407
1925 K Street, N.W.
Washington, D.C. 20006
(202) 785-0611

May 7, 1982

CERTIFICATE OF SERVICE

I, Arnold D. Berkeley, a member of the Bar of this Court and counsel fpr Arizona Electric Power Cooperative, Inc., do hereby certify that, on its behalf, I have this day served, in accordance with Rule 28 of the Rules of the Supreme Court of the United States, a copy of the foregoing Reply of Arizona Electric Power Cooperative, Inc. to the Responses of the West Virginia Public Service Commission, Kentucky West Virginia Gas Company, Kansas-Nebraska Natural Gas Company, Inc. and Michigan Wisconsin Pipe Line Company to its Motion for Contemporaneous Consideration and Disposition of Petitions for Certiorari, by first-class mail, postage prepaid, upon the following:

Jerome M. Feit, Solicitor
Federal Energy Regulatory Commission
825 North Capitol Street, N.E.
Washington, D.C. 20426

Rex E. Lee
Solicitor General
Department of Justice
Washington, D.C. 20530

John Holtzinger, Jr.
Karol Lyn Newman
Kevin J. Lipson
Morgan, Lewis & Bockius
1800 M Street, N.W.
Washington, D.C. 20036

Philip J. Mause
Norman A. Pedersen
Kadison, Pfaelzer, Woodard,
Quinn & Rossi
1229 19th Street, N.W.
Washington, D.C. 20036

Frank X. Kelly,
Gallagher, Boland, Meiburger
and Brosnan
821 15th Street, N.W.
Washington, D.C. 20005

Kim Martin Clark
Akin, Gump, Hauer & Feld
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036

Harry L. Albrecht
1120 Connecticut Ave., N.W.
Washington, D.C. 20036

George W. McHenry, Jr.
McHenry & Staffier
Suite 403
1300 19th Street, N.W.
Washington, D.C. 20036

James D. McKinney, Jr.
Ross, Marsh & Foster
888 16th Street, N.W.
Washington, D.C. 20006

Alan C. Wolf
Mid-Louisiana Gas Company
Twenty-first floor
Lykes Center
300 Poydres Street
New Orleans, Louisiana 70130

Philip C. Wrangle
Southern Natural Gas Company
Exploration and Production Div.
P.O. Box 1513
Houston, Texas 77001

C. Frank Reifsnyder
Hogan & Hartson
815 Connecticut Ave., N.W.
Washington, D.C. 20006

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William T. Miller
Miller, Balis & O'Neil, P.C.
1030 15th Street, N.W.
Washington, D.C. 20005

Jeffrey D. Komarow
Cadwalader, Wickershaw & Taft
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036

Raymond N. Shibley
Brian D. O'Neill
LeBouef, Lamb, Leiby & MacRae
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036

William M. Lange
Michael Loenig
Colorado Interstate Gas Co.
P.O. Box 1087
Colorado Springs, Colorado 80944

Columbia Gas Transmission Corp.
John M. Hill
Giles D. H. Snyder
L. Michael Bridges
P.O. Box 1273
Charleston, West Virgnia 25325

United Gas Pipeline Corporation
John C. Nelson, Vice President
P.O. Box 1478
Houston, Texas 77001

Frederick Moring
Jennifer N. Waters
Crowell & Moring
1100 Connecticut Ave., N.W.
Washington, D.C. 20036

Neil Powers, Jr.
Butler, Binion, Rice,
Cook & Knapp
1100 Esperson Building
Houston, Texas 77002

Richard A. Solomon
Wilner & Scheiner
Suite 300
1200 New Hampshire Ave., N.W.
Washington, D.C. 20036

Public Service Commission
of the State of New York
Peter Schiff, General Counsel
Empire State Plaza
318 Floor
Albany, New York 12223

Robert R. Rodecker
General Counsel
Public Service Commission
of West Virginia
950 Kanawha Boulevard, East
Charleston, West Virginia 25301

Bruce F. Kiely
Kirk K. Van Tine
Baker & Botts
1701 Pennsylvania Ave., N.W.
Washington, D.C. 20006

Donald I. MacIver, Jr., Gen. Counsel
Arthur R. Formanek, Jr.
El Paso Natural Gas Co.
P.O. Box 1492
El Paso, Texas 79978

Robert T. Haggerty
Ted P. Gerarden
McGee & Ketcham
1019 19th Street, N.W.
Washington, D.C. 20036

American Gas Association
Donald J. Schellhardt
1515 Wilson Boulevard
Arlington, Virginia 22209

J. Michael Marcoux
1201 Connecticut Ave., N.W.
Washington, D.C. 20036

Stanley W. Balis,
776 Executive Building
1030 15th Street, N.W.
Washington, D.C. 20036

Southern Natural Gas Co.
Ronald L. Luhn, Jr., Vice President
P.O. Box 2563
Birmingham, Alabama 35202

Natural Gas Pipeline Company
of America
Ronald MacNicholas, Vice President
122 South Michigan Avenue
Chicago, Illinois 60603

Miriam Vogel Gold
Legal Department
Ciba-Geigy Corporation
Ardsley, New York 10502

John B. Will
Deborah K. Vinson
Northern Natural Gas Company
2223 Dodge Street
Omaha, Nebraska 68102

Arnold D. Berkeley

Arnold D. Berkeley
Richard I. Chaifetz
Suite 407
1925 K Street, N.W.
Washington, D.C. 20006
(202) 785-0611

Counsel of Record for
Arizona Electric Power Cooperative,
Inc.

NO. 81-1958-CFX 81-2042 VIDE: 81-1889 SEE: 81-1672	TITLE	Arizona Electric Power Cooperative, Inc., Petitioner v. Mid-Louisiana Gas Company, et al.

DOCKETED	COURT
Apr. 23, 1982	United States Court of Appeals for the Fifth Circuit

DATE	PROCEEDINGS AND ORDERS
	Counsel for Petitioner: Arnold D. Berkeley
	Counsel for Respondents: Solicitor General, Frank X. Kelly, George W. McHenry, Jr., James D. McKinney, Jr. C. Frank Reifsnyder, John E. Holtzinger, Jr. (Over)
Apr. 23, 1982	Petition for writ of certiorari filed. (Record filed).
Apr. 23, 1982	Motion of petitioner to expedite consideration of petition for writ of certiorari filed.
Apr. 27, 1982	DISTRIBUTED. 4-30. (Petition and motion to expedite)
Apr. 29, 1982	Opposition of Public Service Commission of West Virginia to motion of petitioner to expedite consideration filed
May 5, 1982	Opposition of respondents Kentucky-West Virginia Gas Company, et al. to motion to expedite filed.
May 5, 1982	Opposition of respondent Mid-Louisiana Gas Company to motion to expedite filed.
May 6, 1982	Opposition of respondent El Paso Natural Gas Company to motion to expedite filed.
May 6, 1982	Opposition of Consolidated Gas Supply Corporation to motion to expedite filed.
May 7, 1982	Reply of petitioner to oppositions of West Virginia Public Service Commission and Kentucky-West Virginia Gas Company, et al. filed.
May 10, 1982	DISTRIBUTED. 5-13.
May 10, 1982	Motion of Public Utilities Commission of the State of California, et al. for leave to file a brief as amici curiae filed. (Vide: 81-1889, 81-2042).
May 11, 1982	Order extending time for respondent Mid-Louisiana Gas Co., et al. to file a response to the petition until June15, 1982.
May 13, 1982	Brief, amici curiae, on behalf of The Commonwealth of Pennsylvania and the Pennsylvania Public Utility Commission in support of petition filed. (Vide: 81-1889).
May 17, 1982	DISTRIBUTED. 5-20. (Motion to expedite).
May 20, 1982	Opposition to motion of Public Utilities Commission of the State of California, et al. for leave to file a brief as amici curiae filed by Colorado Interstate Gas Co. (Vide: 81-1889, 81-2042.
May 24, 1982	The motion of petitioner to expedite consideration of petition for a writ of certiorari is DENIED.
May 20, 1982	Order extending time for respondent El Paso Natural Gas Company to file a response to the petition until June 15, 1982.
	(Over)

Title

Counsel for respondent cont'd: William Michael Lange

No.

DATE	PROCEEDINGS AND ORDERS
May 25, 1982	Brief of respondent Colorado Gas Company in opposition filed. (Vide: 81-1889, 81-2042).
May 26, 1982	Order extending time for the Government to file a response to the petition until July 6, 1982.
June 4, 1982	Order extending time for respondents "Pipelines" to file a response to the petition until July 15, 1982.
June 28, 1982	Brief, amicus curiae, of Public Power Group in support of petition filed. (Vide: 81-1889, 81-2042).
Aug. 4, 1982	Brief in opposition of respondents Kansas-Nebraska Natural Gas Company, Inc., et al. filed. (Vide: 81-1889, 81-2042, 82-19).
Aug. 4, 1982	Brief of respondent Kentucky West Virginia Gas Company in opposition filed. (Vide in all cases).
Aug. 4, 1982	Brief of respondent Consolidated Gas Supply Corporation in opposition filed. (Vide in all cases).
Aug. 4, 1982	Motion of The National Rural Electric Cooperative Association for leave to file a brief as amicus curiae filed. (Vide in all cases).
Aug. 5, 1982	Brief of El Paso Natural Gas Company in opposition filed. (Vide in all cases).
Aug. 5, 1982	Brief of respondent Mid Louisiana Gas Company in oppsotion filed. (Vide in all cases).
Aug. 5, 1982	Motion of Edmund G. Brown, Jr., Governor of California for leave to file a brief as amicus curiae filed. (Vide in all cases).
Aug. 11, 1982	DISTRIBUTED. SL17P1.
Aug. 16, 1982	Brief of respondent Colorado Interstate Gas Company in opposition to brief of Edmund G. Brown, Jr., Governor of California as amicus curiae filed. (Vide in all cases).
Aug. 19, 1982	Opposition of respondent Colorado Interstate Gas Company filed.
Aug. 25, 1982	Opposition of respondent Consolidated Gas Supply Corporation to motions for leave to file briefs amicus curiae filed. (Vide: 81-1889, 81-2042, 82-19) (D).
Sept. 27, 1982	Reply brief for the petitioner filed. (D).
Oct. 4, 1982	The motion of Public Utilities Commission of the State of California et al. for leave to file a brief as amici curiae in Nos. 81-1889, 81-1958 and 81-2042 is GRANTED. The motion of Associated Gas Distributors for leave to file a brief as amicus curiae in No. 81-1889 is GRANTED. The motion of National Rural Electric Cooperative Association for leave to file a brief as amicus curiae is GRANTED. The motion of Edmund G. Brown, J., Governor of California, for leave to file a brief as amicus curiae is GRANTED. Petition GRANTED. The case is consolidated with 81-1889, 81-2042 and 82-19 and a total of one hour is allotted for oral argument.

(Card No. 2)

No. 81-1958-CFX	TITLE Arizona Electric Power Cooperative, Inc., Petitioner, v. Mid-Louisiana Gas Company, et al.

DOCKETED	COURT
Apr. 23, 1982	United States Court of Appeals for the Fifth Circuit

DATE	PROCEEDINGS AND ORDERS
Nov. 9, 1982	Motion of the parties to dispense with printing the joint appendix filed. (Vide: 81-1889, 81-2042, 82-19).
Nov. 18, 1982	Motion of the Public Utilities Commission of the State of California, et al. for leave to file a brief as amici curiae in support of petitioner filed. (Vide: 81-1889, 81-2042, 82-19).
Nov. 19, 1982	Motion of Edmund G. Brown, Jr., Governor of California, for leave to file a brief as amicus curiae filed. (Vide: 81-1889, 81-2042, 82-19).
Nov. 19, 1982	Brief, amicus curiae, of Public Power Group in support of petitioners filed. (Vide: 81-1889, 81-2042, 82-19).
Nov. 18, 1982	DISTRIBUTED. 11-24. (Motion to dispense with printing joint appendix).
Nov. 19, 1982	Order extending time to file the PETITIONER'S brief on the merits until No. 29, 1982, and RESPONDENTS' brief on the merits until Jan. 11, 1983.
Nov. 29, 1982	The motion of the parties to dispense with printing the joint appendix is GRANTED. The motion of Public Utilities Commission of California, et al. for leave to file a brief as amici curiae is GRANTED.
Nov. 29, 1982	Brief for petitioner Arizona Electric Power Coorperative, Inc. filed. (Vide: 81-1889, 81-2042, 82-19).
Nov. 30, 1982	Brief for The Federal Energy Regulatory Commission filed. (Vide: 81-1889, 81-2042, 82-19).
Dec. 6, 1982	The motion of Edmund G. Brown, Jr., Governor of California, for leave to file a brief as amicus curiae is GRANTED.
Dec. 13, 1982	Motion of AZ Electric Power Cooperative, Inc., No. 81-1958, for division of oral argument filed.
Dec. 13, 1982	Motion of petitioner in No. 81-1889 for divided argument filed.
Dec. 27, 1982	Opposition of petitioner Michigan to above two motions filed. (Only in 81-2042).
Jan. 10, 1983	The motion of Public Service Commission of New York for divided argument is DENIED. The motion of Arizona Electric Power Cooperative, Inc. for divided argument is DENIED.
Jan. 10, 1983	Brief for respondent Consolidated Gas Supply Corporation filed. (Vide: 81-1889, 81-2042, 82-19).
Jan. 11, 1982	Brief for respondent Michigan Wisconsin Pipe Line Company filed. (Vide: 81-1889, 81-2042, 82-19).

(Over)

81-1958

Title

No.

DATE	PROCEEDINGS AND ORDERS
Jan. 11, 1983	Brief of respondent Mid-Louisiana Gas Company, et al., filed. (In all vide cases).
March 11, 1983	Reply brief of Arizona Electric Power Cooperative, Inc. filed. (D). (In all vide cases).
March 14, 1983	Reply brief of the Public Service Commission of the State of New York filed. (D). (In all vide cases).
March 15, 1983	Reply brief for The Federal Energy Regulatory Commission filed. (D). (In all vide cases).
March 22, 1983	ARGUED.
March 28, 1983	Motion of Public Service Commission of the State of New York for leave to file a supplemental brief after argument filed. (In all vide cases).
March 30, 1983	DISTRIBUTED. 4-1. (Above motion).
April 4, 1982	The motion of Public Service Commission of New York for leave to file a supplemental brief, after argument, is GRANTED.
Apr. 11, 1983	Motion of respondents for leave to file a reply to the Supplemental Memorandum of petitioners after argument filed. (In all vide cases).